IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

J.W., A MINOR, BY AND THROUGH AMANDA WILLIAMS
AS GUARDIAN AND NEXT FRIEND, ET AL. PLAINTIFFS

VERSUS CIVIL ACTION NOS. 3:21-cv-00667-CWR-LGI
3:22-cv-00171-CWR-LGI
Related Cases: 3:23-cv-00243-CWR-LGI
3:21-cv-00667-CWR-LGI
3:23-cv-00246-CWR-LGI
3:22-cv-00171-CWR-LGI
3:23-cv-00250-CWR-LGI
3:23-cv-00478-CWR-LGI

THE CITY OF JACKSON, MISSISSIPPI, ET AL. DEFENDANTS

MOTIONS PROCEEDINGS
BEFORE THE HONORABLE CARLTON W. REEVES,
UNITED STATES DISTRICT COURT JUDGE,
MARCH 2, 2023,
JACKSON, MISSISSIPPI

(APPEARANCES NOTED HEREIN.)

REPORTED BY:

CANDICE S. CRANE, RPR, RCR, CCR #1781
OFFICIAL COURT REPORTER
501 E. Court Street, Suite 2.500
Jackson, Mississippi 39201
Telephone: (601)608-4187
E-mail: Candice_Crane@mssd.uscourts.gov

A P P E A R A N C E S:

FOR THE PLAINTIFFS: COREY M. STERN, ESQ.
ROGEN K. CHHABRA, ESQ.
DARRYL M. GIBBS, ESQ.

FOR DEFENDANT CITY OF JACKSON:
CATORIA PARKER MARTIN, ESQ.
CLARENCE WEBSTER, III, ESQ.
ADAM STONE, ESQ.
KAYTIE M. PICKETT, ESQ.

FOR DEFENDANT MAYOR CHOKWE A. LUMUMBA, JR., AND ROBERT MILLER: JOHN F. HAWKINS, ESQ.

FOR DEFENDANTS TONY YARBER, KISHIA POWELL, AND JARRIOT SMASH: TERRIS C. HARRIS, ESQ.

FOR DEFENDANTS MSDH AND JIM CRAIG:
GERALD L. KUCIA, ESQ.
DOUGLAS T. MIRACLE, ESQ.
EDDEREK LINNEL COLE, ESQ.
MEADE W. MITCHELL, ESQ.
ORLANDO RICHMOND, SR., ESQ.

TABLE OF CONTENTS

IN OPEN COURT, MARCH 2, 2023

MS. SUMMERS: All rise. Hear ye, hear ye, hear ye, the United States District Court for the Southern District of Mississippi, Northern Division, is now in session. The Honorable Carlton W. Reeves presiding. May God save the United States and this Honorable Court.

THE COURT: You may be seated.

Good morning. We're here today in the case of JW, a minor, et al., versus the City of Jackson, et al., Cause Number 3:21-CV-663, and I know there are related cases 3:21-CV-667 and 3:21-CV-171.

We're here to address the various motions that have been filed by the defendants. I think every defendant has filed some form of motion, except for Defendant Trilogy, is it? That's the only -- Trilogy Engineering Services has not filed anything. I take it, then, everybody says that they need to be let go, and Trilogy carry the water for the rest of this case forever and for all eternity. That's what y'all want; right? Yeah. Okay.

All right. So who do I have for the plaintiffs?

MR. CHHABRA: Rogen Chhabra for the plaintiffs, Your Honor.

MR. GIBBS: Darryl Gibbs for the plaintiffs.

MR. STERN: Corey Stern, Your Honor, it's a pleasure

to be before you.

THE COURT: All right. Thank you.

Who's for the City of Jackson?

MR. WEBSTER: Clarence Webster, Your Honor.

THE COURT: All right.

MR. WEBSTER: And I have my law partners, Adam Stone and Kaytie Pickett, in the courtroom as well.

THE COURT: Okay. Thank you.

Mayor Chokwe Lumumba, Jr., is his counsel here?

MR. HAWKINS: Yes, Your Honor.

THE COURT: You need to speak into the microphone for the court reporter.

MR. HAWKINS: Yes, Your Honor. John Hawkins for Mayor Lumumba and Robert Miller.

THE COURT: Okay. All right. Who is here for Jarriot Smash?

MR. HARRIS: Your Honor, Terris Harris on behalf of Jarriot Smash, Tony Yarber, and Kishia Powell.

THE COURT: Okay. Thank you, Mr. Harris.

Mississippi Department of Health?

MR. MITCHELL: Meade Mitchell and Orlando Richmond on behalf of the department as well as Mr. Jim Craig.

THE COURT: Okay. Thank you.

MR. MITCHELL: And also Gerald Kucia here with the Attorney General's Office, my law partner Beau Cole is in

the audience, and Doug Miracle with the Attorney General's Office.

THE COURT: Okay. All right.

MR. WEBSTER: And, Judge, just for the record, the City Attorney for Jackson is here as well.

THE COURT: All right. So we'll take up these motions now. I'm ready to hear whichever order y'all -- it's a bunch of y'all.

MR. MITCHELL: Your Honor, my name, again, is Meade Mitchell. I'm here on behalf of the state Department of Health and Mr. Jim Craig.

As the Court mentioned, there are three consolidated cases here: the *Williams* case, the *Reed* case, and the *Ford* case. There are approximately a thousand plaintiffs in these three cases. In each of the cases, our clients have filed a 12(b)(6) motion. The complaints in each of these three cases against our clients and the motions by our clients are virtually identical on all three of the cases, so unless I say otherwise, all the arguments that I make here are going to be about our motions in all three of the cases, which I think is what the Court desires; correct?

THE COURT: That would be great.

MR. MITCHELL: In these cases, Your Honor, the plaintiffs have sued many defendants, and the allegations against each of the defendants are different. And those

distinctions are important in evaluating whether or not the plaintiffs have set forth a cognizable claim. Here, though the department and Mr. Craig disputes the accuracy of the plaintiffs' claims against them, we recognize for the purposes of this motion that you've got to look at the facts as the plaintiffs pled them and accept them as accurate in determining whether they've stated a cognizable claim. But here --

THE REPORTER: Slow down a bit for me, please.

THE COURT: Yeah, you need to slow down --

MR. MITCHELL: But here --

THE COURT: -- for the court reporter.

MR. MITCHELL: -- the face of the complaint does not state a viable claim against our clients.

Now, before I get going, I want to talk a little bit about this. You know, I know that perhaps Mr. Stern may -- may come here and he may talk generally about the state of the City of Jackson's water, but the current -- and the current issues about the City of Jackson's water have been highly publicized. But this isn't a case against my clients about the current state of Jackson's water system. And while there are allegations against some of the defendants in this case covering many years, this motion is about whether the plaintiffs have pled a cognizable claim against the department and Mr. Craig for actions they

allegedly took in 2015 and 2016 only.

Though the complaint is long, there are only three factually based allegations against my clients in a very narrow period of time. Against Mr. Craig they've asserted two 1983 claims. Each allege a substantive due process violation under the Fourteenth Amendment of the United States Constitution: One is they allege that we violated the right to bodily integrity; and, two, they allege we violated the right to be free from a state-created danger.

Also, they've asserted a negligence claim against both Mr. Craig and the department, and those negligence claims are governed under the MTCA. Two of the three claims relate to the manner of testing for lead and copper in 2015 and the timeliness of the reporting of the findings of those tests in January 2016. The last relates to the propriety of a boil water instruction Mr. Craig allegedly issued in February of 2016.

Now, to provide a basic context for what I'm talking about with these claims, the federal government enacted the Safe Drinking Water Act in 1974, and it's overseen and enforced by the EPA at the national level. At the Mississippi level, our legislature adopted the Mississippi Safe Drinking Water Act in 1997. Thereunder, the state assumed the primary enforcement responsibility in Mississippi for the federal Safe Drinking Water Act. The

EPA, of course, still has enforcement authority in the state, but Mississippi -- the Mississippi department assigned the responsibility for primary enforcement was the Department of Health.

The federal Safe Drinking Water Act has a rule called "the Lead and Copper Rule." All water systems in the country are required to comply with this rule, not just Jackson. As part of the Lead and Copper Rule, samples must be gathered from every water system in the country at certain intervals.

At the time of the events at issue in this complaint, Jackson had to gather samples at three-year intervals; that's called triennial testing. Prior to the events at issue in this complaint, the last triennial testing period had ended on December 31st, 2012. The testing at issue concerning my clients' concerns the testing for the triennial period that began on January 1st, '23, (sic) and ended on December 31st, 2015.

Triennial testing under the Lead and Copper Rule is not a testing of all homes in Jackson. It is a testing of a sampling of homes. For the three-year period that ended on December 31st, 2015, it was a testing of 58 homes in Jackson.

Under the LCR, water test samples are gathered and tested for lead; then they're ranked from highest

concentration of lead to lowest concentration of lead. The top 10 percent of the samples, the top ten highest, are averaged, and if the average exceeds 15 parts per billion, that is called a Lead and Copper Rule Action Level, and steps are required to be taken by the water system here in Jackson. In this case, the testing for the three-year period that ended on December 31st, '15, did exceed 15 parts per billion, and that was the first time that had occurred in Jackson.

With this context, let's look at the factual allegations against Mr. Craig. Section 6 of the complaint concerns the LCR testing. Plaintiffs claim that Mr. -- that the department, at Mr. Craig's direction, conducted water testing in June using improper test methods. They specifically claim that Mr. Craig instructed and conducted that the tests be run by gently running water to fill the containers. So, Your Honor, when they -- when the tests are run, you have to fill a container, and then they send those in for testing. They claim that that was done gently instead of running it as a normal water would be run, and that we instructed that there be preflushing of the water tips -- taps before the sample was gathered. Plaintiffs argue this was contrary to EPA guidance and likely lowered the results of the lead detected; that's Count 1.

THE COURT: Okay. So if that's the case that

they're alleging, then that would be unauthorized or that would be something out of bounds of what the EPA would require. I mean, it's unauthorized, does that sort of lead to it?

Because I have to accept -- like you said, I have to accept what they say in the complaint right now as true. So you've described for me how EPA said the tests were supposed to be done, what intervals the tests were supposed to be done, and that they were doing that. They claim that the testing procedure that the state engaged in was unauthorized.

Unauthorized by whom? I guess the EPA, but it was unauthorized. So is there a response to that?

MR. MITCHELL: The response to that is they claim it was contrary to EPA guidance, not regulation, not statute. They claim it was contrary to EPA guidance. And, Judge, the mere fact that -- obviously, you do have to look at the complaint and look at the words as plead, but the words as pled don't state a claim. It's still not -- it's still not a constitutional right. It's still not a clearly established constitutional right. It still doesn't survive the Mississippi Tort Claims Act discretionary immunity test.

THE COURT: Well, we're going to deal with the federal constitutional stuff first, because you

mentioned --

MR. MITCHELL: That's right.

THE COURT: -- the other state law claims --

MR. MITCHELL: That's right.

THE COURT: -- second.

MR. MITCHELL: That's right. So that's the first claim.

The second claim is they claim we provided -- that Mr. Craig provided notification of the results of that testing to Jackson in an untimely manner. In particular, they claim that Mr. Craig did not provide the results to Jackson until January of 2016 for the triennial testing period, even though the water testing occurred in late 2015.

The last allegation against my clients is that they claim in February of 2016, Mr. Craig warned that small children and pregnant mothers shouldn't consume the water for six months without boiling it. They claim that this was dangerously ignorant, because boiling water causes higher lead levels in the water.

So that's it; those are the factual claims against my clients. They may argue they've pled more, they haven't. There's --

THE COURT: Well, let's assume that is what they've pled, exactly what you said that the test the state used is

unauthorized; that information taken from those unauthorized tests yielded unreliable information; that that information -- and then they relied on that unreliable information and forwarded that information in an untimely manner to the state -- excuse me, to the City of Jackson. And then because it was unreliable and the type of information that they did give to the City of Jackson saying boil your water, the fact that you told them to boil the water lead to more problems, because it increased the level of lead in whatever pot you were boiling the water in.

So assuming that those are the claims and assuming that each of those things can be proven, then the next step is what, Mr. Mitchell?

MR. MITCHELL: To address whether we're entitled to qualified immunity concerning those claims. And we contend that we are, and I'll explain why. Because they have to establish that they can survive -- once we raise it, it's their burden to refute any qualified immunity assertion of Mr. Craig --

THE COURT: Are you conceding that there's a constitutional violation on the front end?

MR. MITCHELL: Absolutely not.

THE COURT: Okay.

MR. MITCHELL: They have to show that there's a

constitution of a -- that there's a violation of a constitutional right, and then they have to show it was a violation of a clearly established constitutional right, and then they have to show that the alleged misconduct was objectively unreasonable in light of that clearly established constitutional right, and they fail at every level.

Qualified immunity has to be resolved at the earliest phase of the litigation. It has to be based upon an examination of the pleadings. Generalities in the pleadings don't do it. There have to be specific factual allegations that must be evaluated to determine whether we're entitled to qualified immunity.

THE COURT: Well, let me ask you about that. I'm going back to the core premise of what I just said, would that create -- I mean, is that particular enough that the state was obligated to do tests? I think you'll concede that the state -- you said EPA guidance said the state had to do tests. They might have done them on a triennial basis or some other.

Is the state required to test the water?

MR. MITCHELL: No. We're not required to test the water.

THE COURT: Did the state --

MR. MITCHELL: I didn't say that.

THE COURT: Okay.

MR. MITCHELL: I did not -- I did not say that.

THE COURT: Okay. The state is not required to test the water?

MR. MITCHELL: The state is not required to test the water. They have a lab where there's water testing done.

THE COURT: Okay. So the state is not required to test the water?

MR. MITCHELL: They're not required to, but they do for multiple cities in the -- around the state.

THE COURT: Okay.

MR. MITCHELL: And the allegations here obviously that have to be accepted is that we did, so I'm accepting them. So I'm -- I'm arguing the face of the pleadings, Your Honor, right.

THE COURT: Okay. But I'm asking this specific question: Is the state required to test water?

MR. MITCHELL: It's not required to, no.

THE COURT: Okay. All right. So if it's not required to test water, it doesn't matter what type of techniques they used to test the water then, I presume would be the state's argument; right?

MR. MITCHELL: That's not the argument that I'm making, Your Honor.

THE COURT: Oh, okay.

MR. MITCHELL: I'm -- I'm simply arguing that on the face of the pleadings, they haven't stated a claim that would survive qualified immunity. I think what you were asking is a pretty detailed factual question, which I'm really not prepared to address here in this motion argument. I'm prepared to address whether or not they've stated a claim based on the face of the pleadings, and I don't believe they have. Of course, I don't believe they can satisfy their burden --

THE COURT: They said the state has used unauthorized techniques. I think that's in the complaint, or maybe I'm adding words to it.

MR. MITCHELL: It has to be a -- Judge, it's not -- the allegation that we violated a guidance in the EPA or the allegation that we -- we -- even that we violated some sort of EPA standing rule doesn't mean that they've established a clear constitutional right. It has to be a constitutional right.

You know, a constitutional right is far different than violating guidance, and that's where they really fail here. This is not a constitutional claim that they've asserted, and that's why they're not going to be able to survive. Its -- you know, they've pled a state-created danger claim. The Fifth Circuit has never, never recognized a state-created danger claim. They've rejected

it over and over and over again: The *Chavis* decision in 2015, the *Cancino* decision in 2019, the *Robinson* decision in 2020. It's been rejected over and over again, and that really should end the inquiry on their state-created danger, substantive due process claim.

Also, Your Honor, since it's never been recognized, even if the Court were to recognize it now, it could not be said to have been clearly established at the time of Mr. Craig's alleged acts in 2015 and 2016. And in fact, the *Chavis* decision in 2015 has a summary statement that says that.

The other claim that they assert, Your Honor, is a due --

THE COURT: What was the purpose of the state providing the boil water notices to the people in the City of Jackson? Why did the state do that?

MR. MITCHELL: Your Honor, I'm not sure they did. They -- there's one sentence in the complaint that says that Mr. Craig advised women and children to boil the water for six months. You're asking me about the factual accuracy of it; I don't know. I'm only looking at the words of the complaint. That's the one sentence in the complaint that says anything about that; that's all I know.

So in terms of the bodily integrity claim, their claim is that we violated the right to bodily integrity

under the Fourteenth Amendment, and so it's those three actions --

THE COURT: I'm going to go back to my previous question first. I'm going to allow you to make your argument.

MR. MITCHELL: Yes, sir.

THE COURT: We're going to do that. We've got plenty of time for all y'all.

MR. MITCHELL: Sure. Sure.

THE COURT: But these are very important issues to the Court.

MR. MITCHELL: I understand.

THE COURT: So if you -- if you issue the boil water notices -- maybe the plaintiff will tell me -- but what is the purpose of issuing the boil water notice?

MR. MITCHELL: Judge, it doesn't say that we issued a boil water notice. It just -- the words of the complaint are Mr. Craig, in February of 2016, advised that women (sic) and pregnant women should boil water for the next six months. It doesn't say how it was issued or anything about it. I don't know what they're talking about. But I have to accept it as true for the purposes of this argument. Okay? So I am, but it still doesn't state a claim.

THE COURT: Okay. I mean, generally, people warn people of something, so that they can be informed of

something.

MR. MITCHELL: Yeah, sure.

THE COURT: I mean, wear your seatbelt --

MR. MITCHELL: Sure.

THE COURT: -- because not wearing your seatbelt might get you hurt, so what would be the purpose of telling -- if all that is said is that the women and children were told not to drink the water, does the complaint say enough? Should they have to say more?

MR. MITCHELL: Yes.

THE COURT: Okay.

MR. MITCHELL: All they say is this was -- what they said is that telling people to do that was grossly ignorant or dangerously ignorant, because they say when you boil the water, it actually increases the lead because you're boiling off the water and that increases the lead content.

That's all they say. They had to have said more. You know, gross negligence and -- is not enough to defeat qualified immunity. Those claims simply can't survive.

So we were talking about the right to bodily integrity claim. So the key issue is there's no constitutional right that they've asserted as to any of these three allegations. To state a cognizable claim that survives qualified immunity, they have to find a recognized liberty interest within the purview of the Fourteenth

Amendment of the Constitution. It's not enough to allege misconduct. The misconduct must violate a constitutional right. It's a --

THE COURT: So there let me -- let's go to that point. Their position -- I think their position is it violated their right to bodily integrity, that's the constitutional claim they're asserting. Can we agree on that point?

MR. MITCHELL: We can agree, Your Honor, that the Supreme Court has recognized that a bodily integrity right exists under the Fourteenth Amendment of the U.S. Constitution. But not as to these facts, we can't.

THE COURT: Okay. But that's the claim they're trying to travel under.

MR. MITCHELL: That is the claim they're trying to travel under.

THE COURT: Okay. All right.

MR. MITCHELL: And state-created danger, which the Fifth Circuit has rejected.

THE COURT: Okay. You can take them in whichever order you want to take them in.

MR. MITCHELL: Yeah. I'd already addressed state-created danger, which I think should be rejected because the Fifth Circuit's rejected it. So I'm going to concentrate now on bodily integrity, if that's okay with

the Court?

THE COURT: That's fine.

MR. MITCHELL: All right. So for them to establish a constitutional right exists, the Supreme Court has held that the due process right must be so deeply rooted in this nation's history and tradition and implicit in the concept of ordered liberty that neither liberty nor justice would exist if it were sacrificed. And that's out of the *Washington* case, a Supreme Court case in 1997.

Bodily integrity is a generally accepted constitutional right, as this Court just mentioned, but that's not the question. The question is whether an intrusion on the bodily integrity constitutional right is recognized in the circumstances alleged as to Mr. Craig. In evaluating these questions, the Supreme Court has said that they're always reluctant to expand the scope of substantive due process because guideposts for responsible decision-making are scarce in this area; and that's the *Collins* Supreme Court case in 1992.

And the Supreme Court also stated the court must exercise "judicial self-restraint" and "exercise the utmost care whenever asked to break new ground in this field." That's again the *Collins* case.

Here, the plaintiffs are asserting a violation of an alleged constitutional right to safe drinking water.

That's not how they describe their bodily integrity claim, but I believe that is exactly what they've pled. There is no clearly established constitutional right to safe drinking water protected in the United States Constitution. There's an entire statutory and regulatory framework on the federal and national level on safe drinking water.

But plaintiffs' assertion as to this Section 1983 claim is that there exists a constitutional right under the Fourteenth Amendment, and that right does not exist. It's not a liberty interest that's deeply rooted in this nation's history and tradition. It's not a right implicit in the concept of ordered liberty. The conceptual premise that the framers of the constitution in 1789 considered safe drinking water a protected constitutional right isn't logical.

THE COURT: Should we look at what the framers did for the Fourteenth Amendment, though, and not go back to 1789? Because the Thirteenth, Fourteenth, and Fifteenth Amendment might have tried to fix what was left out by the guys who did 1789. You're talking about bodily integrity from the Fourteenth Amendment?

MR. MITCHELL: That's right, Your Honor.

THE COURT: So why go back to 1789 for example? Why not look at what was the premise under the Fourteenth Amendment?

MR. MITCHELL: You know, Your Honor, you're -- that's -- you make a good point. Maybe you should look at it at the time the Fourteenth Amendment was adopted, but that was also before disinfection of public water systems had even begun in the United States. Again, the premise that this was a constitutionally protected right at those early dates was simply --

THE COURT: But the Fourteenth Amendment was done to give bodily integrity, to give some indicia of personhood to the formerly enslaved individual. They were now persons, so they had something to protect in themselves. They had a right now to their own bodies, did they not, through the Fourteenth Amendment that did not even exist for them in 1789?

MR. MITCHELL: You're talking about the freed slaves? Yes, Your Honor.

THE COURT: Right. Right. So bodily integrity, what does that mean under the Fourteenth Amendment versus what it might have meant under the amendments in 1789, or what it might mean today?

MR. MITCHELL: Your Honor, the cases that I've examined say over and over and over again that if ground has not been broken in these areas, that the Court should be extremely reluctant to break new constitutional ground for fear that the floodgates of litigation would open

because there aren't guideposts that guide things. I believe this, recognizing a constitutional right to contaminant-free water, would be a textbook example of an improper expansion of the U.S. Constitution, and I believe that the *Collins* case, a U.S. Supreme Court case, the *Reno* Supreme Court case, and even the *Gonzalez* Fifth Circuit case support that.

The plaintiffs here, Your Honor, I will say this, they claim they're not even making -- that their bodily integrity claim isn't the right to safe drinking water. I think they do that, because they understand that such a claim can't proceed under the laws that I've seen. But they are making that claim, because what they alleged is Mr. Craig -- first, they didn't allege Mr. Craig introduced lead into anybody's body; he didn't. Their allegations are that he should have -- that he failed to test properly, that he failed to warn timely, and that he failed to issue a proper boil water notice.

Those are allegations about failing to protect plaintiffs from contaminated water. But if the U.S. Constitution doesn't guarantee a constitutional right to clean drinking water, how can it guarantee the right not to be exposed to contaminated drinking water? We submit that it does not, and that their 1983 claims should be dismissed.

Moreover, Your Honor, in addition to it not being a constitutional right that is recognized, it certainly was not a clearly established right in 2015 and 2016 when the alleged actions occurred. To establish and defeat qualified immunity, the plaintiffs have to set forth highly specific case law that would put an official on notice that his conduct was unconstitutional, and the Fifth Circuit has said that in many, many cases. The precedent at the time of the alleged conduct here, 2015, 2016, must have placed a constitutional question beyond debate. Abstract general statements of legal principles without near analogous facts are not enough; that's the *Vincent* case in 2015. To be a clearly established constitutional right, the contours of the law must be so clear that every reasonable official would have understood he was violating the constitution.

The plaintiffs do not cite a U.S. Supreme Court case or a Fifth Circuit case that has ever held that the Fourteenth Amendment right to bodily integrity includes a constitutional right to contaminant-free water.

Now, it's not our burden to show the absence of a constitutional right. It's their burden to show that it does not exist. It's not our burden to show the absence of it, but I will tell you this, Your Honor, there are courts that have said it doesn't exist. There's a case called *Colshaw* out of California, and it said that the right to

bodily integrity is not coextensive with the right to be free of an allegedly contaminated substance in public drinking water. It stated that the constitution does not guarantee the right to contaminant-free water.

And there's several other cases that suggest that there is not a constitutional right to be free from pollutants generally. There's a case called *Concerned Citizens of Nebraska* out of the Eighth Circuit that says there's no right to be free of nonnaturally occurring radiation.

There's a case called *Lake* out of the Southern District of Michigan in 2017 stating that whenever federal courts were asked to determine if there's a fundamental right to freedom from contaminental (sic) harm -- contaminants, harmful contaminants, they've rejected it.

There's a case called *Hagedorn* out of Virginia where claims of exposure to pollutants from a plant were not protected. The court said that there's no right to be protected from environmental degradation.

There's a case called *In Re: Detroit* out of the Sixth Circuit that says there's no fundamental right to water service. Even the *Guertin* case, which is the case out of the Sixth Circuit that you see cited by the plaintiffs in their brief a lot, that they rely heavily upon, states there's no fundamental constitutional right to

water service or to a contaminant-free environment.

There can be little question that plaintiffs are attempting to create a new constitutional claim, and the novelty of the claim is enough to doubt it and to deny it. If there's no precedent that puts the claim beyond debate, then the law affords qualified immunity.

Now, to be clear, the court -- the plaintiffs are arguing that that's really not what they're claiming but they -- if that's not what they're claiming, they are arguing that the body integrity rights should be greatly expanded. They're trying to argue that the bodily integrity rights should be expanded to cover the allegations against Mr. Craig, but they don't cite any Fifth Circuit case recognizing such a claim based on the facts alleged against Mr. Craig.

In fact, Judge, courts in the Fifth Circuit have traditionally recognized invasion of the constitutional right to bodily integrity only where there's direct physical conduct -- contact by the defendant with the plaintiff or in extreme examples where the defendant coerced a plaintiff into physical action. There's no physical contact or coercion alleged against Mr. Craig.

The plaintiffs don't cite any case other than *Guertin* that's remotely like the claims against Mr. Craig, but the *Guertin* case falls short of the highly specific

case law that is required to establish a clearly established constitutional right.

Moreover, and critical to this case, *Guertin*'s a 2019 decision. It postdated Mr. Craig's acts by years. It could not have put Mr. Craig on notice in June of '15 and February of '16 that his alleged decisions were clearly unconstitutional.

You know, Your Honor, what the plaintiffs argue, what it boils down to is they argue that Mr. Craig's conduct was so egregious that it ought to be recognized as a violation of the right to body integrity. But no case suggests using an incorrect water test method, providing late notice, or providing an ill-advised boil water notice is a clearly established constitutional violation.

Also, Your Honor, they can't satisfy their burden of showing that Mr. Craig's conduct was objectively unreasonable in light of clearly established law. The objectively unreasonable standard requires us to look at case law on deliberate indifference. The law on whether a defendant's alleged conduct is deliberately indifferent is examined to determine whether their conduct is objectively unreasonable.

I will say this, Your Honor, many cases in this circuit address this as kind of part and parcel of determining whether there's a clearly established

constitutional right, but regardless, the Court must address whether the allegations as pled state a claim against Mr. Craig that he acted with deliberate indifference to a clearly established constitutional right. The law has to be particularized to the facts of a case. It must show the conduct is unconstitutional beyond debate.

For deliberate indifference, a defendant has to subjectively know and then consciously disregard an excessive risk to the plaintiffs' health.

THE COURT: Just make sure you slow down a bit when you're reading.

MR. MITCHELL: I'm sorry; I do have a tendency to move fast. I apologize.

A state actor must also have actual knowledge of an excessive risk. That's a high standard. It's a lot more than negligence. It's more than gross negligence. They must have a purpose to cause harm; that's deliberate indifference. So the question here is does the case law support finding that the acts committed by Mr. Craig were deliberately indifferent? It doesn't.

Let's look at the boil water notice. Only two sentences of the complaint relate to this. Plaintiffs allege that Mr. Craig in February warned small children and pregnant mothers not to consume the water for six months without boiling. They say that's dangerously ignorant, but

they cite no cases suggesting that issuing an ill-advised boil water notice would be deliberately indifferent to a clearly established constitutional right. They cite no cases suggesting that every reasonable official should have known that if his boil water notice was incorrect, he was impinging on a protected constitutional right.

THE COURT: So all they have to do is, what, to allege that particular claim?

I mean, what we're here on is a 12(b)(6), so if they allege that claim like you say it should be alleged, does that get them across to the next step? If they say every reasonable official would know that issuing a boil water notice telling parents, telling mothers of small children, for six months, do not drink the water without boiling notice, every reasonable official who knows that the water has lead contaminants in it, then go and issue that notice, then that reasonable official is acting unreasonable, and therefore is in violation of whatever.

I mean, because I think what you've just said is that's not in there. And if they were to put that in there, does that get them closer to where they need to go?

MR. MITCHELL: Absolutely not.

THE COURT: Okay.

MR. MITCHELL: Absolutely not. The words are just words. The Court looks at the facts that are alleged in

the complaint to determine whether or not clearly established case law suggests that factual pattern violates clearly established constitutional law. They can put all those words in that they want. This fact pattern is not going to violate clearly established constitutional law, and it should fail. Mr. Craig is entitled to qualified immunity on the boil water issue.

The second issue is the water test methods. Again, that's the one where they claim that we used water testing techniques that were wrong; that we gently ran the water instead of running -- instructing them to run it normally, and that we ran the water or flushed the pipes instead of not running the water and flushing the pipes before the testing began. To be clear, they don't refer to a statute or a regulation of the EPA that mandates that testing occur in the manner that they allege. Rather --

THE COURT: But even if they did, you, I think earlier -- please correct me if I'm wrong. Even if they did, you would say that EPA stuff would be guidance.

MR. MITCHELL: Well, no, the EPA does have regulations, Your Honor.

THE COURT: Okay.

MR. MITCHELL: They do have regulations. They just don't cite any regulations. They cite to a guidance document.

THE COURT: Okay. All right.

MR. MITCHELL: What they refer to is a letter written by the EPA. It's attached as Exhibit 3 to the complaint. It's a letter by an EPA Director named Ralph Scott to another director for a group called "The Alliance of Healthy Homes." It's a letter that was addressing questions that had been raised about the DC water system. That's what they claim Mr. Craig wasn't following in 2015 and 2016, a letter from the EPA to another water system, and here's what it --

THE COURT: And what's the date of that letter?

MR. MITCHELL: The date, it was in 2008. I don't remember the exact date, but it was a 2008 letter.

And the funny thing is, Judge, I want you to -- I won't read it all, but I would encourage you to look at the letter and -- and because that letter is a part of this complaint. And here's what the letter says, we -- and this is a quote from the letter: "We believe that homeowners collecting samples should use their water as they normally would."

Let me back up. The letter here was asking about some of the test methods that Washington DC was doing for collecting Lead and Copper Rules, and so they were asking the EPA for information about whether some of these tests were done right. And the EPA responded to this group and

said the purpose of the monitoring protocol is to determine if corrosion control is effective in reducing lead and copper leaching at times and locations where we would expect the levels to be greatest under normal conditions.

The next sentence is, "We believe that homeowners collecting samples should use their water as they normally would." Okay. That's one of the key sentences they rely on.

And then the next paragraph says, "We do not understand why Washington believes that it would be necessary to request flushing only in households participating in the sampling. While this may fall within a strict legal interpretation of the regulations, we believe it goes against the intent of the monitoring protocol, since it changes the normal water use. We will discuss this matter with the water quality manager at that Washington facility to determine if there's a rationale that we should consider as we evaluate this issue."

Now, it doesn't -- this letter doesn't say anything about running water gently being incorrect. It just says run the water as you normally would. It doesn't say that flushing pipes violates the EPA regulations. In fact, it says that doing so falls within the strict legal interpretations of the EPA regulations, but that they think it goes against the intent of them. But then it has an

important "but." It says, "but we'll speak to the water supplier and evaluate it further."

Running water gently or flushing the pipes doesn't violate the express terms of this letter. There's certainly no reasonable argument that gently running water or flushing pipes evidences deliberate indifference to a clearly established constitutional right based on this letter, and there are no cases supporting such a theory whatsoever.

Now, the next thing they argue is that the flushing practice or running the water before you took the sample was not consistent with an EPA recommendation that issued on February 29th of 2016, and they attached that memorandum as Exhibit 4 to the complaint. Here's their first, biggest problem: That memorandum is dated February 29th, 2016. The 58 samples were taken in June of 2015. The memorandum came out seven months after the testing was done, so it doesn't -- it's not pertinent to the allegations against Mr. Craig, because it didn't exist.

Also, the EPA memorandum did contain a recommendation, and it said the EPA recommends that sampling instructions not contain a prestagnation flushing test. But because it issued seven months after the testing had been completed, it has no bearing on this case. Moreover, it's a memo, not a regulation. There are no

cases suggesting that not following a nonbinding guidance document constitutes deliberate indifference. There really just aren't any cases, Judge, suggesting that Mr. Craig should have been aware there was a clearly established law suggesting that if one used preflushing versus nonpreflushing, he was violating the constitution of the United States.

On the other hand, there are cases that say that violation of state and federal guidelines aren't enough; *Holloway* out of Kentucky. Other cases state that failure to follow industry standards, operating procedures, and federal guidelines don't constitute deliberate indifference; that's the *Gumns* case out of the Middle District of Louisiana. So that's the second allegation against our client.

The third is the timeliness of the reporting, so the plaintiffs claim that Mr. Craig reported the results of the testing that he did in June of 2015 on those 58 homes late. Those were the homes that were the subject of the Lead and Copper Rule testing that I told the Court about at the beginning of my argument. Those were the tests for the triennial period that ran from January of '13 until December 31st of '15.

Plaintiffs claim that Mr. Craig didn't provide the results to Jackson until January 26, 2016, even though the

testing occurred in late June. Now, they also pled that Mr. Craig explained at a press conference that he was following EPA guidelines in determining when to report. They also claim that Mr. Craig did not rely on a reasoned analysis of those EPA guidelines, and they cite to a regulation that they claim says that the testing should have been reported to the public as soon as possible. They cite 40 CFR 14185. That's the only regulation they cite, but the regulation doesn't impose duties on the department. It imposes duties on water suppliers like Jackson, not Mr. Craig. A constitutional violation can't exist for not following a regulation that doesn't apply to them.

Also, they may argue that Mr. Craig's actions were intentional, but that boilerplate allegation in the complaint isn't supported by the actual factual allegations in the complaint. What's available for the Court to analyze are the allegations that he relied improperly on EPA guidance, and you can't just look at labels and conclusions. You've got to look at the facts as alleged.

But more importantly, Your Honor, they don't cite any case suggesting it's beyond debate that Mr. Craig should have known he was acting in a manner deliberately indifferent to a clearly established constitutional right if he reported lead testing results for a small sampling of Jackson homes late. Again, the question is whether late

notice violates fundamental rights and liberties that are deeply rooted in our nation's history and tradition; that are implicit in the concept of ordered liberty; and that neither liberty or justice would exist if they're sacrificed; and secondarily whether they were clearly established at the time of Mr. Craig's acts. Viewed in that context, the claims fail.

There are actually many cases, Your Honor, that have refused to recognize a constitutionally protected due process right for failure to warn of hazards, many. For example, the United States Supreme Court in *Collins versus City of Harker Heights*, that's a 1992 case, was asked to recognize a constitutional substantive due process claim for employees of the city to be warned of the possibility of an asphyxia when doing sewer repairs in the line, and the allegations were that the city knew of the risk based on prior incidents. The court refused. The court said we have previously rejected claims that the due process clause should be interpreted to impose federal duties that are traditionally imposed by state law.

Collins was the first of many cases -- we looked at that *Collins* case and looked to see what other cases have cited for a similar proposition. There are lots of cases. Here's an example from the Fifth Circuit. The Fifth Circuit in 103 F. App'x 814 (5th Cir. 2004), the plaintiffs

allege that their school was built in a manner that resulted in water leaking into the building allowing toxic mold to form. They claim that the school district should have known about the mold infestation but failed to warn the employees and students of the danger. The District Court granted the school district's motion to dismiss the 1983 claim. The court found that the plaintiffs did not state a viable Section 1983 claim based upon the alleged failure to provide a safe, healthy work environment.

Citing *Collins*, the Fifth Circuit affirmed the dismissal on appeal holding that a government employer's failure to warn about known hazards in the workplace does not violate due process, even if such conduct might be actionable under state law. That's the Fifth Circuit.

THE COURT: Well, you gave me the citation. Could you give me the name of it?

MR. MITCHELL: I actually brought these cases to provide to the Court. *Greene versus Plano*, 227 F.Supp. 2d 615, Eastern District of Texas, 2002, affirmed by the Fifth Circuit 103 F.App'x 542 (5th Cir. 2004).

Your Honor, may I approach?

THE COURT: You may. Make sure the other side --

MR. MITCHELL: There are several cases on the point I'm talking about, so that's the Fifth Circuit case.

Here's another case out of Pennsylvania. The

plaintiffs in that case filed a 1983 claim against the Philadelphia Housing Authority based on its failure to disclose the presence of asbestos and other harmful substances at a Philadelphia Housing Authority facility. The District Court dismissed the claim finding the Supreme Court precedent, including *Collins*, had rejected the notion there was a constitutional right to a safe working environment.

The Third Circuit affirmed the dismissal finding that the plaintiffs' claims, like those in *Collins*, involved allegations the Government knew of unsafe working conditions and failed to take actions. The court found that such conduct, the failure to warn of a known risk, did not rise to the level of a constitutional violation as a matter of law.

There's another case out of New York, *Paige versus New York City*. The plaintiffs brought a 1983 action alleging that the New York Housing Authority failed to enforce federal and state laws requiring annual lead paint inspections for all dwellings. The court granted the defendant's motion to dismiss alleging that -- finding that the failure to take action didn't amount to an affirmative violation of the plaintiffs' constitutional rights.

And last there's a case out of Indiana. The plaintiffs filed a 1983 action against the East Chicago

Housing Authority alleging they had been exposed to lead and arsenic contamination at a public housing complex. They alleged the housing authority intentionally concealed that contamination from them. The court dismissed those claims finding that the plaintiffs had not alleged a constitutional violation.

The court noted that *Collins* and its progeny require the dismissal of bodily integrity 1983 claims based on a willful failure to warn. They found that there's no constitutional due process right to be warned of a known harm even where the Government has offered false assurances.

Now, there are two other cases in there, Your Honor, that support what I'm arguing. The failure to take action is not an affirmative act that is normally recognized under the due process clause of our country. It's the reason the vast, vast majority of the cases involving a violation or invasion of the right to bodily integrity involve direct, physical conduct by the defendant, not a failure to act.

As such, the plaintiffs' alleged violations providing late notice about water sampling, providing late notice of test results, providing an improper boil water notice do not establish a violation of a clearly established constitutional right and certainly not one that existed in 2015 and 2016, and so Mr. Craig is entitled to

qualified immunity.

Now, that's the end of my 1983 argument, and I'll move on to the Mississippi Tort Claims Act argument.

THE COURT: All right. What if the -- okay. We'll let you go to your tort claims.

MR. MITCHELL: Judge, the state is generally immune from suit, but the Mississippi Tort Claims Act waives that immunity under certain scenarios. Its contours are the exclusive state law remedy for injuries caused by the torts of government entities' employees.

The plaintiffs here don't dispute the negligence claims against the department and Mr. Craig are governed by the Mississippi Tort Claims Act. As the Court I'm sure is aware, Mississippi Code 11-46-9 sets forth a number of exceptions to the waiver of sovereign immunity, and if any of those exceptions apply, the department and Mr. Craig are immune. We submit that one of those exceptions mandates dismissal as to the discretionary function immunity test. That's Mississippi Code 11-46-9(1), and it states that a governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty.

Now, the purpose of this provision, Your Honor, is

to protect government actors from judicial second-guessing of legislative and administrative decisions grounded in social-economic policy in tort suits. The provision replies -- applies whether the Court believes the Government entity or its employee abused discretion.

To gain immunity under this test, the Mississippi Supreme Court has adopted a two-prong public policy function test. The activities must be discretionary; in other words, they must involve choice or judgment. And number two, the choice or judgment must involve social, economic, or policy considerations. The test is identical to the test under the federal Tort Claims Act and they're very -- the case law on those are very related.

And as to the first prong, the plaintiffs don't challenge that the actions of Mr. Craig were discretionary, so I'll just move straight to the second prong.

Under the second prong, the complaint must allege facts which would support a finding that the challenged acts were not the kind of conduct that can be said to be grounded in policy. Importantly, the defendants don't have to prove they actually considered any policy implications in choosing to engage in the activities. The question is whether their conduct was susceptible to policy analysis and that's --

THE COURT: Well, do you believe the activity that

the defendant -- excuse me. What does the defendant contend that the activity in which it engaged that the plaintiff -- what do you believe the plaintiff is saying about the activity that they contend that you engaged in?

MR. MITCHELL: We believe that they're claiming that our policy on water testing was flawed. We believe they contend our policy on when -- the timing of when to issue the test results on that testing was flawed, and we believe they're contending that the policy on what we said in our boil water notices was flawed. And because we believe that all of those are policy decisions, we believe it falls within the policy exception, and that we're entitled to immunity.

THE COURT: So basically going back to what we talked about in the opening I think, that you used some sort of preflushing method that was not proper. That's one of them; right?

MR. MITCHELL: I didn't hear what you --

THE COURT: You used some sort of pretesting, preflushing method; that the preflushing method that the state engaged in was improper.

MR. MITCHELL: That's right. We believe --

THE COURT: I mean, that's one of the allegations; right?

MR. MITCHELL: Yes, one. We believe they allege

that our -- the way we tested or sampled the water, flushing, was an improper policy; that's number one.

We believe they are alleging that the timing of when we reported those results in January of 2016 was another improper policy. And last, we believe that they are arguing that the way that we issued one particular boil water advisory was an improper policy decision. And because we believe that all of those allegations relate to policy, it falls within the discretionary immunity function of the MTCA.

THE COURT: Do they also -- I guess this is part of that third point, but they also contend that you failed -- that the state failed to provide the citizens of Jackson with sufficient information, so that they can make the right choices; right?

MR. MITCHELL: That was part of that, that we provided the late notice; that's part and parcel of that statement is that we -- they claim that we should have provided the notice earlier than we did, and because of that, the citizens of Jackson were deprived of notice for a period of time. It's the same argument.

THE COURT: And that the notice that you provided was improper or defective because it tells them to boil the water, and the fact of boiling the water itself exacerbates the amount of lead in it. So you give them the

information, they followed what you tell them to do, and it kills them --

MR. MITCHELL: Actually the --

THE COURT: -- right? Or it messes up the children.

MR. MITCHELL: I saw those -- you just connected those two, and I've never seen them as connected. They claim that we provided the results of the 58 tests late in January of 2016. The boil water notice they're talking about was a month later. I don't -- there's no connection to those two, Your Honor. You've just connected them, and I haven't seen them connected in that way in the complaint. They're all three distinct acts, if that makes sense, the way that they're pled.

THE COURT: Okay. The complaint, you read it as a whole; right?

MR. MITCHELL: The way I read the complaint as a whole is they were alleging two acts connected, associated with the water testing and then a boil water notice that was a separate event.

Judge, the Mississippi Supreme Court and the Fifth Circuit have recognized that decisions involving considerations of public welfare fall within the discretionary function provision. There's a *Dancy* case, a Mississippi Supreme Court case from 2006 that says government conduct that involves policy considerations that

emanates from and relates to matters of human welfare, they indicated that that was a policy decision.

There's a case called *In Re: Katrina*, which is an FTCA case finding that the Army Corps of Engineers conduct in failing to dredge -- that the Army Corps of Engineers conduct in carrying out dredge operating --

THE COURT: But we would -- well, is there no difference between how the Mississippi Supreme Court has construed its MTCA between how the federal courts construe the FTCA?

MR. MITCHELL: There was a case -- I can't remember the case cite now. I mean, the case says that the MTCA appears to be virtually identical in pattern on the FTCA. It seems there's actually cases that suggest that the -- that we've tried to mesh our decisions in Mississippi with analogous decisions of the Federal Tort Claims Act.

THE COURT: Okay.

MR. MITCHELL: I can't answer the question of whether there might be some minutia of difference, Judge, but in general, they walk in lockstep.

When established government policy as expressed or implied by statute or regulation allows a government agent to exercise discretion, it must be presumed that the agent's acts were grounded in policy. Now, that's out of the *Daubert* U.S. Supreme Court case. Its quote is, "If a

regulation allows the government employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by regulation involves consideration of the same policies which lead to the promulgation of the regulation." That's a U.S. Supreme Court case.

Here, the express purpose of the Mississippi Safe Drinking Water Act is to establish a state program to assure the provision of safe drinking water. The standards, it's given very broad discretion to pursue these rights. In the exercise of its authority, the department may adopt rules and regulations governing the public water system. It has broad powers and duties to take action, and it can take any action it "deemed necessary" to protect the public water health. And all of these statutory provisions I just mentioned are cited in our brief.

This broad discretion granted to the department to carry out its supervisory authority creates a strong presumption that the alleged acts of Mr. Craig in carrying out those duties involved policy considerations. The plaintiffs don't allege facts that would rebut this presumption. Plaintiffs construe Mr. Craig's conduct too narrowly. They claim they weren't policy considerations, that they were just negligent acts, but that's too narrow of a construction.

THE COURT: What if it's just negligent acts of a failure or duty to warn or a failure to have warned properly, would that be a policy decision? Would that be covered by the discretionary function exception in your view?

MR. MITCHELL: Yes.

THE COURT: If one of the claims is or if the Court construes one of the claims being that the state has failed warn, failed to properly warn its citizens of the danger in the water, if it's simple failure to warn?

MR. MITCHELL: No, Your Honor. The case law suggests that those are all -- those are all susceptible to policy analysis, and that's the question of whether they're susceptible to policy analysis.

These are not low-level decision processes. Mr. Craig is a high-level official at the department. It's assumed that the actions he's taking are pursuant to policy, and the case law that we've cited in our brief suggests --

THE COURT: Well, the state would be untouchable on anything then; right? Because the state has policies in place. The state -- everything that the state does is a policy choice, a policy decision.

MR. MITCHELL: They actually -- well, they actually talk about it, Your Honor, and there are a number of cases

on this that are cited in our brief.

There are certainly examples of where simple acts of negligence do not -- that the state is not immune on those. For example, there's a case called *Smith versus Mississippi Transportation*, and in that case, there was one employee that was assigned the duty of signaling passing vehicles of a construction zone ahead. And he didn't do that, and they said that was a simple act of negligence that wasn't susceptible to any sort of policy analysis.

THE COURT: Is it because he's a low-level person? Because he's on the street doing the work, you know, with the road crew, and his obligation is to do the flagging --

MR. MITCHELL: It's because --

THE COURT: Wait, wait, hold on. And because the difference is you mentioned Mr. Craig is so high up, so because he's so high up, obviously he's thinking statewide or he's doing something differently. I mean, he's making -- whatever he does becomes a policy decision, I think, according to what you said earlier.

MR. MITCHELL: No. I think, Your Honor, the reason there is because he was assigned a specific task, and he knew what he was supposed to do and he didn't do it, which was negligence. Whereas, the decision of the Department of Transportation about where, when, and how to place traffic warning signals they said would be a policy decision.

Mr. Craig's acts as alleged in this complaint are more analogous to the *Smith* case. They're more analogous to the transportation commission's decisions about when and where to place signs than the acts of a simple flagman.

THE COURT: So the construction of the specific wording in the boil water notice, for example, that the state approved, then that would be a policy choice. The specific words used I guess to only warn pregnant mothers and children, for example, as opposed to warning everyone else.

MR. MITCHELL: Your Honor, it's difficult for me to see how they can argue the words in a specific boil water notice wouldn't be connected to some sort of policy of how you issue boil water notices, so, yes, I believe it's policy.

Your Honor, that's -- so in sum, the allegations in this case relate to the Mississippi Department of Health's administrative-level policies about how to best collect and test drinking water and report the results. They're also about whether the boil water policies are sound. Whether or not the Mississippi Department of Health acted negligently, which we dispute, in choosing to go about these activities is not determinative, because the decisions are presumed to have been made in furtherance of the Safe Drinking Water Act's broad public health policy

objectives, and therefore these claims are barred by the MTCA's discretionary function provision.

Now, Your Honor, I'm almost through. I've got one more MTCA argument to make. Under the MTCA, the plaintiffs were required to provide certain advance suit notice to the parties. Before they file suit, 90 days before they file suit, they've got to file and provide a short and plain statement of the facts that the claim's based on, the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money they seek, and their residence. And the purpose of this is to allow entities to be properly informed of the claims before they file them.

The plaintiffs have to substantially comply with this, and what constitutes substantial compliance is a question for you, the Court, to decide. But, here, the plaintiffs didn't substantially comply.

I have attached to the motions that I filed in this case the notice of claims that were provided to the department and Mr. Craig. There are a thousand individual plaintiffs, but their notice of claim letters are virtually identical. The only unique information in any of those notice of claims letters is the name of the plaintiff and their address. The letters do not state that any

plaintiff --

THE COURT: Well, let me ask you this. Assuming I agree with you on that, what's the remedy? For them to go back and --

MR. MITCHELL: Yeah.

THE COURT: -- redo it?

Because they have -- are we -- is the statute of limitations an issue with respect to most of these children?

MR. MITCHELL: I don't know how old any of these children are based upon the information that I've been given.

THE COURT: But assuming they are children, how long do they have to file a tort claims notice claiming that they've been damaged by a governmental entity? Assuming they're all children.

MR. MITCHELL: I wasn't really prepared to address it, but I think the law is they have a year after they reach the age of majority.

THE COURT: Okay. And what's --

MR. MITCHELL: I think.

THE COURT: -- the age of majority?

MR. MITCHELL: I think so.

THE COURT: Right. And what's the age of majority: 18 or 21?

MR. MITCHELL: That's -- Judge, I don't know the answer to that. I can't remember. I can't remember if it's 18 or 21. I think it's 18.

THE COURT: Okay. So assuming it's 18 and assuming all of these children here are 18 or less or 17 or less, wouldn't the remedy be to allow them to put the things in the claim, to submit a claim to the state in the way that you want it, so that you could have all of your information that the state desires to have?

And then wait 90 days for the state to act on it, and then file their suit in either state court or here?

MR. MITCHELL: That would be --

THE COURT: I mean, that's what you want; right?

MR. MITCHELL: That's what we want, yeah. And whether or not all of these plaintiffs were to come back would be another question, because we don't have any information about whether any of these thousand children -- and there's a thousand more to come at least -- whether any of these thousand children have been tested for -- had their blood tested for lead or have any diagnosis.

And if they can't put that information in a notice of claim, they may not come back. And they shouldn't because they shouldn't be before this court if they don't have a diagnosis of injury that's been reported in their notice of claim letters.

THE COURT: Right. Okay. So what does the notice of -- the notice of claim has to be that I ingested lead or that I was injured?

MR. MITCHELL: The notice of claim needs to have some sort of showing that there's -- these children have been tested for lead and some sort of showing -- a specific showing, not a boilerplate statement that is the same for all 1,000 plaintiffs -- that they have some diagnosed injury related to their alleged exposure.

THE COURT: What law requires them to bring the proof in the administrative claim that they have been tested and/or that they have been injured?

I drank the water, the water has lead in it, I have these mental whatever disabilities because of having drank the water. Does the Tort Claims Act require more?

MR. MITCHELL: The Tort Claims Act doesn't specify exactly what the detail is. It leaves it to the Court to make that determination. It requires substantial --

THE COURT: But if that's the case, I mean, it shouldn't be left to the Court, right, because the administrative process should mean something.

I know under the FTCA, the administrative process means something. You file a notice of a claim to the agency, so that the agency can evaluate the claim to determine what is there, to get information, so that the

agency can resolve the claim, if necessary.

So what is a notice provision here, other than to give the governmental entity 90 days to review it, and then after that 90 days, the plaintiff can then go to court?

MR. MITCHELL: Judge, I haven't found a case that's on point with the argument I'm making about a mass filing of a thousand plaintiffs. I believe that the statute, when it says you have to state -- you have to provide -- substantially comply with providing real information about the extent of the injury that that means you cannot put the same boilerplate statement in 1,000 plaintiffs' notices that says we have one of the following conditions. That is meaningless. It is meaningless.

THE COURT: Meaningless to whom?

MR. MITCHELL: Meaningless to -- to --

THE COURT: To the agency, to the administrative agency?

MR. MITCHELL: It's meaningless because it tells me absolutely nothing about that particular plaintiff, because he's just lumped in with a thousand others who said exactly the same thing with no level of --

THE COURT: And so through the administrative process, can't the state ask them for more?

MR. MITCHELL: I don't know the answer to that question, Your Honor. All I know is they're supposed to

comply with these notice requirements before they file suit, and that there are many, many cases that indicate when they fail to do so, the suit is dismissed. They have to then comply with the notice requirements before rebringing it. So I don't know the answer to your question.

THE COURT: So I guess my question is, we have a thousand plaintiffs here and a thousand more to come you say, --

MR. MITCHELL: At least.

THE COURT: -- so are we going to have to be dealing with this for the next 18 years for those children -- well, for those children who are six years old, for example, they have until they're 18 or 21 to bring their claim, and if they brought and submitted an administrative claim to the state, said this is John Doe; I live in Jackson, Mississippi; my address is -- this is what it is; I drank the water from the time I was six years old to ten years old; I got grades of whatever, I've been affected by the water that I've drank.

So they file their administrative claim. The state doesn't act for 90 days, then they bring a lawsuit. Would that person be barred if the state brings this argument saying, look, Judge, you look at it; it doesn't say enough. Okay. It doesn't say enough, and I agreed with you and I

dismiss it. But they're 12 years old now. Do they have a right then to go back and fix, you know, until that -- to cure whatever deficiency you're saying that you did not have enough information on the front end?

Because that's what the administrative claim should be about: giving the governmental entity enough information to evaluate it. And until they get that information to evaluate it, do the plaintiffs get second, third, fourth, fifth bites?

I mean, because these are children, and their one-year statute of limitations, or what I heard that they have until the age of majority to bring their claim, so do they repeatedly bring these separate claims? And if they do, will we ever -- will we ever get to the end of this case?

MR. MITCHELL: Here's the answer to the question that I think fits the case. I believe these notices are horribly written and poor in terms of the information they provide. I believe that there are many more plaintiffs to come. I believe that bringing this issue to this Court right now is the best way for me to assure judicial economy and economy of the parties, because I'm now asking this Court to tell us exactly what it insists upon in these notices. I believe --

THE COURT: I think they should -- let the state

tell me --

MR. MITCHELL: I want to read --

THE COURT: Let the state tell me what it requires, too, because I don't want you to go back and say federal court can't tell the state what needs to be in the tort claims notice.

MR. MITCHELL: I want them to tell me what years they allege, because all they do is say for every one of them August 2014 till now. That's it, every one of them, the same thing.

I want them to tell me who their people are of interest, because all they do is name the defendants, and they don't name anybody else who lives in any of these houses who are clearly key witnesses. And I want them to tell me whether they've had a blood test or some other test for lead and whether they have a diagnosed injury of any sort of problem related to lead, and if they don't have a diagnosed injury, they shouldn't be in this court and you shouldn't have to be dealing with them.

THE COURT: So how many witnesses -- I mean, you're talking about the witnesses in the home and all that kind of stuff?

MR. MITCHELL: That's what the notice requires. It says you have to provide a list of the wit- -- I mean, people who have known facts. That's the law. I mean,

maybe they missed somebody, but they surely know who the parents are. They should know who lives in the house with the person, which is a very important person to determine whether or not that child drank the water; don't you think? I think it is.

And they have not identified a single person, a single person other than defendants of people who have knowledge, so those are -- to me, not stating the time, not stating anybody else in the house, not stating whether they have any sort of lead-exposure diagnosis or injury diagnosis are pretty serious flaws.

THE COURT: Okay. So once they do that, is the state going to try to administratively resolve these cases, or are we going to be right back here?

MR. MITCHELL: We'll be right back here.

THE COURT: We will be right back here?

MR. MITCHELL: Oh, absolutely. We don't think we did anything wrong, Judge. Let me make that very, very clear, but maybe --

THE COURT: So we'll be right back here -- wait, wait -- we'll be right back here in 90 days or 90 days after they give you the information they need?

MR. MITCHELL: But maybe not all 1,000 of them if they don't have a diagnosed injury. Maybe -- maybe some are removed from this Court's docket. Maybe some that

might be thinking about filing don't.

Your Honor, that's all I have on my argument. I appreciate the Court's time and attention. Thank you.

THE COURT: Well, I did have one question.

MR. MITCHELL: Oh, I'm sorry, Your Honor.

THE COURT: You had jumped over to the state issue before, and I wanted to ask you, you had talked about this social, economic, and political policymaking considerations of Mr. Craig and others.

Are there any social, economic, or policy considerations if the Court were to read the complaint -- and, of course, the plaintiff is going to tell us what it believes is in that complaint and all that.

But if the Court were to read their complaint to suggest that the state is at least being sued for misleading the people in its notices and misleading them, if that is the claim saying, you know, I was talking about the failure to warn. But also if they are arguing that the warning itself misled them, would that be sort of covered by your analysis about it's a policy choice, it's an economic choice? It's a social, economic, or policy choice to affirmatively mislead?

MR. MITCHELL: Your Honor, the answer to the question is where regulation allows the government agent to exercise discretion, it's presumed that it's grounded in

policy. So the answer to your question is, yes, they are still policy determinations.

And, again, there are cases that say decisions, like, that involve public welfare like this is -- everything we're talking about here about the water is public welfare. Public welfare falls within the discretionary function provision, so the answer to your question is, yes, Your Honor, I still believe it's policy.

THE COURT: Okay. And going back to your state claims, you've said that the defendant -- again, tell me what it is the notice of claim must have according to what the state believes the law require? Must name the individual, must tell when the act or occurrence occurred, I think, the date --

MR. MITCHELL: Name the people in the home that are -- at least the people in the home that would be witnesses.

THE COURT: Now, it said name witnesses. It doesn't say name who's in the home, I mean.

MR. MITCHELL: The actual words, Your Honor, I should be specific, and I'm sorry. Let me look at exactly what it says, Your Honor.

What it says is the name of all persons known to be involved. And so I believe that that includes the parents of the children in the home, because they would be

involved.

THE COURT: Would that also include every individual who worked for the City of Jackson who might have --

MR. MITCHELL: I --

THE COURT: -- been involved in some way?

MR. MITCHELL: No, I don't think so, Your Honor. I think that might be stretching it, substantial compliance, too far, but I do think it certainly includes the people who live with the minor children who would have seen the minor child ingesting water. I think it has to state the time --

THE COURT: Well, wait, I want to make sure. Are you just talking about parents or are you talking about siblings or what?

MR. MITCHELL: Everybody that lives in the home. I'm thinking about parents in particular, but, yes, I think it should be everyone who lives in the home.

The time and place of the injury has to be in the notice, and that's something more than August of 2014 to now. And then the extent of the injury, and I believe that should include whether they've been tested for lead in their body and whether they've been diagnosed with any injury related to lead. Not the same statement for all 1,000 plaintiffs. Specific statements as to each specific plaintiff as to whether or not they've been tested for lead

and whether or not they have a diagnosed injury and saying what the test was and what it revealed and what the diagnosed injury is.

THE COURT: And so what would be the purpose of the state having all that information at that stage? I'm just curious. I know under the FTCA, the agency is under an obligation to try to do the investigation to resolve the claim. They do the investigation to resolve the claim, and if the claim cannot be resolved, then it goes to the court system.

So if the state gets all of this information, the pretesting information, posttesting information, what is it -- what is the state or any of these governmental entities going to do with the information?

MR. MITCHELL: Resolving the claims is but one purpose of the notice. It's also to --

THE COURT: Because the other purpose is for you to go investigate it.

MR. MITCHELL: Yeah, to know and to be properly informed of the claims -- to be properly informed of the claims and to take corrective action if we need to. I don't think there's any corrective action here that needs to be taken. But to be properly informed of the claims, that's a very important thing for us, Your Honor, because I will tell you that the first thing we do here, in my

opinion, is we -- we file a motion to dismiss, because we don't believe there's a cognizable claim.

The second thing that I think has to be addressed --

THE COURT: But the motion --

MR. MITCHELL: -- before we file --

THE COURT: Hold on. The motion to be dismissed will be filed after the suit is filed after the 90 days.

I'm talking about what is the state going to -- what are these governmental entities going to do with the administrative claim itself?

You get all that information. If they give you reams and reams of every test that the child has taken, and those reams shows that there's positive stuff. What is the state going to do with it, other than I guess tell the plaintiff in 91 days now after you've given it to us, go file your suit, so we can then turn around and file a motion to dismiss before the federal judge or the state court judge who has now received this particular case?

MR. MITCHELL: We would have an opportunity to review it, plain and simple, to evaluate whether they have a legitimate claim, and we can't do that with this notice. We can't. We can't do anything with the boilerplate statement for all 1,000 plaintiffs containing a boilerplate statement of injuries. We can't. We can't even evaluate them. We're entitled to exactly what the statute says

we're entitled to: the ability to evaluate them.

THE COURT: Okay. So nothing in this -- this is the notice I think you received. It's Exhibit 1 to something, the notice of claim. Nothing in there informs the Mississippi Department of Health what their -- what these plaintiffs, what any one of these plaintiffs, is contending?

MR. MITCHELL: No, that's not what I said, Your Honor. Nothing in there said -- defines the date properly. Nothing in there tells me who lived in the homes. Nothing in there tells me if a particular plaintiff has had any sort of lead testing or has a specific diagnosis of injury.

There are general statements in all 1,000 of them. If you'd look, you'd see the extent of the injury section in there, Your Honor, in the exhibit -- in the exhibit. Its -- there's one clause in there, it says "extent of injury," and if you find it in there, you will have found the exact same language that is in all 1,000 of those letters, boilerplate.

THE COURT: Well, "the extent of the injury, upon information and belief, the plaintiff has suffered injuries, including but not limited to: cognitive deficits, behavioral changes, memory and attention deficits, learning impairments, impaired emotional functioning, and visual-perceptual deficits. The full and precise extent of

plaintiff's injuries and future harm is currently unknown."

And then it says the injury occurred from August 2014 to the present in Jackson, Mississippi, so you know where the injury occurred. You know when it occurred. You know what injuries that they claim they suffered.

Now, it sounds like the only thing you need or you claim to need is who are -- who may be some of the witnesses.

MR. MITCHELL: No, Your Honor. I disagree with what you just said. I don't believe I know anything based upon this boilerplate about when the alleged injury occurred. "August 2014 to present" tells me nothing. The same "upon information and belief" under the recitation of every possible --

THE COURT: What requires them to do anything more specific than August 2014? What, under Mississippi --

MR. MITCHELL: That's what I believe.

THE COURT: -- law, requires them to do anything other than a date range like that?

MR. MITCHELL: I believe that substantial compliance with the notice provisions does, Your Honor. I don't believe this is substantial compliance. I don't believe a thousand identical statements, which tell me absolutely nothing about any particular plaintiff, complies with the notice provisions of the MTCA.

I think it has to be particularized, and I think if you'll look at this, you'll see that it's not. It's a thousand of the same boilerplate language for all 1,000 children, and if we don't do something about it, the next 1,000 are going to look just like this with the same boilerplate language that tells us nothing.

THE COURT: Assuming that there was a -- and we've had these cases before, I'm sure, with the state. Assuming you have a school bus, the school bus runs into another school bus. You've got 60 children involved in the accident. They describe that there was an accident between two school buses. I was thrown about the vehicle, and I was hurt. The accident occurred on March 2nd, 2023, in Hinds County, Mississippi, in Jackson, Mississippi. On this date, I suffered injuries. I'm under the medical care of X. Is that enough information if each one of those 60 children were to have filed that?

The witnesses were the bus driver and all the other students on the bus. Would that be enough information, or would that be too vague because we don't know the extent of the injury of each individual? Does that give the state enough information to go out and do and evaluate this claim or these claims that have been filed for each of the 60 individuals? Although they're all going to say the same thing. The extent of the injuries are I got hurt.

MR. MITCHELL: No, I don't think that's enough.
THE COURT: Okay. But if you got --
MR. MITCHELL: I thought that the date information that you gave in that example would have been enough. I thought that the date -- I just don't think the description of the injuries would be enough to satisfy and substantially comply with the MTCA notice requirements.
THE COURT: Okay. All right.
MR. MITCHELL: Thank you, Your Honor.
THE COURT: Thank you.
For my court reporter's purposes, we're going to take a brief recess for about 15 minutes. I'd like to hear from the plaintiffs with respect to the arguments, and that's how we're going to do it. And whatever other defendant comes up next, you'll have an opportunity for rebuttal, Mr. Mitchell.
All right. We'll be in recess.
MR. MITCHELL: Thank you, Your Honor.
MS. SUMMERS: All rise.
(A brief recess was taken.)
MR. STERN: Thank you, Your Honor. May I approach?
THE COURT: You may.
MR. STERN: Corey Stern on behalf of the plaintiffs, and if I go too fast, I would love it for somebody to remind me or to stop me. Because sometimes I do, and I

apologize in advance.

THE COURT: Okay. We will.

MR. STERN: I'm sure you will.

I intend to try and take the arguments against what Mr. Mitchell just argued in order, but I'd like to start just for a second at the end when Your Honor was discussing the state Tort Claims Act, you had some pointed questions.

Number one, the age of majority in Mississippi is 21, which means that each of our clients has until age 22 to provide their notice of claim.

Number two, if -- and I don't want to pretend or act as though I am a Mississippi practitioner who has had 20 years of experience practicing in state courts in Mississippi. But our local counsel, counsel for these plaintiffs, has informed me that in 25 years of their practice in filing notices of claims with the state and other agencies, they have never provided notices with the level of specificity that exists in this case.

And the reality is that it seems as though Mr. Mitchell's and the state's argument is most concerned about the fact that there are so many, that there are a thousand notices that all indicate the same injuries. But I would submit to the Court that if a plane were to crash and there were 250 people on board, and all of them filed a notice of claim for some state agency or some act within a

state agency that went wrong, all of them would have the same injury; they'd all be dead.

And I'm not claiming and we're not claiming that any children died or that someone committed the act of murder or homicide of any kind. But just because a thousand children all suffer cognitive deficits, just because a thousand children claim to have consumed water in the same city over the same period of time, that doesn't make it deficient. And if any one of these notices singularly had been presented to any state agency, this idea that they were deficient simply wouldn't be based on the same foundation that Mr. Mitchell just presented.

And in addition to that, it seems as though what Mr. Mitchell and his clients want from our clients is to provide medical documents. They want us to provide diagnoses for some injuries that take years to actually evolve because a child's brain continues to develop over time, which is why the statute of limitations is a year after they turn 21 -- because kids' injuries don't always manifest themselves as quickly as, say, a broken arm would from a bus crash -- only so after 90 days, they could walk into court at some point after a complaint was filed and then argue they are immune from liability because of the discretionary function.

I would submit to the Court, how do they know

they're immune from liability based on the discretionary function prong if they can't make heads or sense about what the claims are? You can't walk in and argue to the Court that all of the things alleged in this notice of claim elicit this exception to the rule that they are immune from liability, but at the same time say that we don't know what they're actually alleging against us. That's counterintuitive.

THE COURT: Well, let me ask you this question I asked the state with respect to if the Court agrees with the state, and you go back and you do your best attempt to get the state what they want, and the state still says that's not enough. They sit on it for 90 days, that's not enough with respect to that particular plaintiff. You file suit in state or federal court, wherever these cases may end up landing. Whatever court -- because, you know, if you decide later on to just go with state court claims, it may end up being a state court. So I'm suggesting that you do what they ask -- you do what you think they have asked --

MR. STERN: They would --

THE COURT: Hold on.

MR. STERN: Oh, sorry.

THE COURT: And then you file suit in court; they file a motion to dismiss because it does not -- we don't

have enough medical records. You claim that the child was hospitalized. You claim that the school records were here; well, we only have his school records from elementary school. You don't have his school records from high school. You don't have his school records from trade school from the time he was 18 to 21, so therefore the claim is still not sufficient. A court will be obligated, I presume, then to dismiss it.

And then because the plaintiff would still have until they're 21 or 25 or whatever that age is, would that plaintiff then be able to come back, give them the information, file the administrative claim, like, including the middle school records now, including the high school records? Because that was the one thing that -- or the couple of things the state said were missing and justified dismissal.

Would you be able to do that is my question?

MR. STERN: So, yes, and here's why:

First, I believe that the notice of claim in and of itself would toll any type of statute as to the notice, because if it's deficient, then the party would have more opportunity to cure the deficiency.

Number two, because of the reasons that Your Honor has articulated in terms of the statute of limitations and the year from when a minor reaches the age of majority,

they'd have until at least they were 22 years old.

But more importantly, the purpose of the notice of claim is for efficiencies. It's to create an environment where state agencies can evaluate claims in an efficient manner to avoid protracted litigation, to avoid having 20 or 30 lawyers involved to come into a courtroom to argue motions to dismiss. The whole purpose of the notice of claim is to create efficiencies. And under the, you know, Mitchell standard or the state's articulated standard that's being suggested now, it's a requirement that each plaintiff actually prove their case by way of the notice of claim in order for a child, for instance, to prove a lead poisoning case. First, you have to show that the child had ingested lead, whether its from paint or water. Then you have to show they were actually injured; they suffered cognitive deficits.

How does that work? You have to hire a neuropsychologist to evaluate the child to make a determination about those deficits. Then you have to hire somebody, usually a pediatrician, to make the determination that those deficits articulated by that expert were caused by the very ingestion of lead, be it from paint, be it from water.

Then you have to hire an economist to look at the child to, to look at the testing, to look at the reports of

those other experts to make the determination that Child John, who has ADHD, has other cognitive deficits, and a psychologist *(sic)* says would have earned X but instead would earn Y. The economist then has to place numbers and values on the future earnings of that child under what Mr. Mitchell articulated should be the standard that he wants Your Honor to dictate to the plaintiffs in this case: a thousand who have already filed their notices. And a thousand more who may, and who knows how many other children in Jackson may one day make a claim?

He wants all of that in a notice of claim, and that is litigation. That is how we determine damages. That is how we determine causation. And this idea that a notice of claim requires all the witnesses, a notice of claim when it asks for who has knowledge about this, it's about the individuals from the agency being put on notice, so they know what's being claimed against them.

If every child in Jackson was required to not only have a neuropsych, not only have a pediatrician, not only have an economist, not only provide their school records, but provide the names of every witness, or some subjective standard where at least the names of the witnesses who live in the house, that would cause inefficiencies. It flies in the face of why we have a notice of claim process not just in Mississippi or in Georgia or in Michigan, but even the

federal tort claims. It's to avoid what Your Honor is articulating would be a cyclical filing of notices to fix notices to fix notices only so eventually Mr. Mitchell, or someone else from the state or on behalf of the city, can walk in and say we've read them, they're boilerplate; they don't tell us anything. But despite that they don't tell us anything, we are entitled to immunity because of the discretionary function.

And, again, I submit to Your Honor if we know so well that we file a motion to dismiss the -- the state tort claims act separate and apart from the timing of the notice. Then substantively, we are asking Your Honor -- the state and the city -- you must dismiss the Mississippi Tort Claims Act because the notices as provided led us to believe that we are entitled to the discretionary function, what more do they need from the plaintiffs?

What more do they need to determine that they're immune? So they want each child in Mississippi or their lawyers to spend thousands upon thousands upon thousands of dollars to get experts, to get records, to then submit those in writing in a way that meets the code, which means it either has to be by certified mail or FedEx, only so they can read them, and then walk into this courtroom or a state courtroom to say we've read it all, it's no longer boilerplate. We really appreciate it. Now we know that

Johnny has a lead level of 8.5, but that doesn't change the conduct upon which they're asking the Court to determine that they're entitled to immunity.

THE COURT: Okay. Slow down a little bit for the court reporter.

MR. STERN: Okay. Thank you.

All right. I want to now go back, if Your Honor would indulge me, to the various claims that plaintiffs have alleged. We've just spent significant time on the Tort Claims Act. I'm going to go back to the two constitutional claims.

THE COURT: Yeah. That's what I'm really interested in --

MR. STERN: Okay.

THE COURT: -- because plaintiff (sic) reads your complaint, and they sort of say how they viewed it.

MR. STERN: Sure.

THE COURT: They -- well, the defendant, the state says this is what the plaintiff has pled.

MR. STERN: I never --

THE COURT: Now, you tell me what the plaintiffs pled.

MR. STERN: I've never had a case where I filed a complaint where the defendants read it the same way that we believe we pled it, and so this is not a unique

circumstance. And obviously on this type motion under Rule 12, Your Honor must take, in the light most favorable to the plaintiffs, a whole reading of the complaint as it should be read.

I'll start with this, Mr. Craig, he's not a robot. This is not someone who just moves from point A to point B and just makes decisions based on policy, and the complaint doesn't say that he's -- he's violated plaintiffs' rights to bodily integrity because he didn't follow the directive. What the complaint says, when read in the light most favorable to the plaintiff, is that he crafted a methodology to yield lower test results that -- let me go back a minute.

Mr. Craig has been in this position or at least worked for this department since 2004. This is not someone who just showed up one day in 2014 or 2015 or 2016 and decided that he was going to make all kinds of policy decisions. This was someone who as early as 2004 worked for the Mississippi State Department of Health.

In 2011 the Mississippi Department of Health recognized, and the complaint pleads this, it alleges this, that they were aware the City of Jackson was at high risk for lead poisoning; that the children in Jackson were at high risk for lead poisoning. So while we don't say that in 2011, Mr. Craig, who had been in the job since 2004,

must have been aware of lead poisoning and that being a very, very high probability for the City of Jackson. When you read in the complaint that he was there in '04, when you read in the complaint that he was there through at least 2016, when you read in the complaint that as early as 2011, the Mississippi State Department of Health knew that Jackson was a ticking time bomb for lead poisoning and lead contamination and that kids could get hurt, it is not just easy to, but it must be read, the complaint, to know that Mr. Craig was aware.

So let's start with this fact as pled in the complaint that by 2011, five years before any of this ever happened, everybody wants to -- to -- or Mr. Mitchell came in and said, well, I expect Mr. Stern's going to talk about the current condition of the water in Jackson. I'm not going to say a word about the current condition of the water in Jackson. I'm going to focus exclusively on the time period Mr. Mitchell argued about when he was up here prior to the break knowing that Jackson was a hotbed for lead poisoning, knowing that children could be poisoned, he -- he created testing procedures to conceal test results, conceal. He trained employees to run taps slowly knowing full well because of his experience at the Mississippi State Department of Health that doing so would yield lead levels that were lower than they really were

separate and apart from guidance from anyone. No one needs to show there's a violation of bodily integrity because Mr. Craig violated some statute promulgated by the federal law or by the EPA or that the guidance is what plaintiffs are alleging.

What plaintiffs are alleging is that this man knew when he was in charge in 2011, in 2012, in 2013, in 2014, in 2015, in 2016 that Jackson had no corrosion control; that Jackson was consisting primarily of lead pipes, joists, and solder; that five years earlier, it was put on notice that the city could very well become a time bomb. Before Flint -- before Flint, they knew that Jackson could have very high lead results and kids could be poisoned, and then with that knowledge, he made the decision to teach the folks in his department how to preflush to skew the results deliberately. He made the decision to tell them to run the water slowly to skew the results deliberately. And then when the results came in in 2015, yes, he was mandated to report them, and instead he waited six months before he told any parent in Jackson.

All the people who filed their notices of claims on behalf of their children that weren't sufficient enough, he waited six months to let them know what he knew in 2011 and what he surely knew when the test results came back even after they were performed or before they were performed

using his methodology.

THE COURT: What in the complaint alleges that he was required to let them know sooner than six months?

MR. STERN: Absolutely.

THE COURT: I said what in the complaint itself alleges that he was obligated to inform the public? You say he waited six months?

MR. STERN: Correct.

THE COURT: What in the complaint says or alleges that he should have or that he was either required to, or are we just saying that waiting the six months to do it is problematic?

MR. STERN: So I can point Your Honor to -- we'll talk about the JW complaint. It's Document 51, it's the amended complaint. I'll point to you a number of paragraphs, and then tell you what the paragraphs say. It's paragraph 195, 221 to 225, 196 to 220, 228.

Some of these may be inclusive because I've just made a list based on the allegations, and then I'll tell you what they say.

223, 231, 232, 226 to 235, and 242 to 243, and it says that in June 2015, lead levels were in exceedance of the 90th percentile, which according to EPA regulations requires notice to be placed on the website of the Mississippi State Department of Health as well as in a

newspaper to provide the residents and citizens of Jackson information about where they can find these results. These exceedances immediately triggered those notices. That's what's pled, the requirement for those notices.

THE COURT: That's all I need to know, where it is in the complaint.

MR. STERN: Yeah.

THE COURT: You suggest that those paragraphs will tell me exactly where it is in the complaint.

MR. STERN: Yes. And, respectfully, Your Honor came upon something when -- when you had an interaction with Mr. Mitchell earlier where he said I have not read the complaint the way you did, Your Honor, but you're reading it a different way than I did. And you said, well, aren't I supposed to read it in the light most favorable to the plaintiff inclusive of all the facts?

And what the complaint says, which is what Your Honor pointed out, when Craig finally provided the notices late -- when he provided them late, he downplayed the results and blamed the EPA. There was literally no public information about what was in the water that these children were drinking despite being triggered to provide that information to the citizens of Jackson. If that's not recklessness -- and I'll get into the standard of conduct that's required under the law and why what Mr. Mitchell

described as the standard is a little bit different than what we believe the cases actually say.

But if that's not deliberate indifference -- if a man who knows five years earlier that Jackson can be a hotbed for lead poisoning and that children could get hurt. If a man knows that the exceedances, which are words that someone in his position would know, but not everybody else might necessarily understand what they mean. If he knows there's exceedances in the 90th percentile triggering notices and he waits six months, if that is not deliberate indifference, then I don't know what is.

To the point about whether the bodily integrity or the concept of bodily integrity is actually a constitutionally protected right, I'm not sure what I heard Mr. Mitchell say. On the one hand, I think he said that it is constitutionally protected, and it is. The Supreme Court has recognized through the Fourteenth Amendment that bodily integrity is absolutely a protected right.

Missouri versus McNeely, which was cited by Mr. Mitchell, although I'm not sure for the proposition the court recognized it. But the court said, "We have never retreated," and this was in 2013. 2013 before the Flint water crisis; 2013 before the testing came, but 2013 after -- after Mr. Craig knew that Flint (sic) was a hotbed for lead poisoning, "We have never retreated from our

recognition that any compelled intrusion into the human body implicates significant constitutionally protected privacy rights."

Schmerber versus California, "The integrity of an individual's person is a cherished value of our society."

And then I'm not sure, again, if Mr. Mitchell was saying the Fifth Circuit had not recognized this right, but if he did, he's wrong. In *Doe versus Edgewood*, that's 964 F.3d 351; *Priester versus Lowndes County*, 354 F.3d 414; *Alton versus Texas A&M University*, 168 F.3d 196. The Fifth Circuit has recognized that the right to bodily integrity is protected by the Fourteenth Amendment.

There's this idea that all of the defendants have posited to the Court that what plaintiffs are saying is that we had our rights violated because they didn't provide us with safe water; that is not true. That is not at all what plaintiffs are saying.

Plaintiffs are claiming not that Craig had a duty to protect them from contaminated water, but that he violated their rights to bodily integrity when he made decisions that caused, contributed to, exacerbated, or prolonged their ingestion of lead-contaminated water. No one is saying he's the shield. No one is saying that the right to bodily integrity includes a violation of the right because someone didn't act as a shield.

When reading the allegations in the complaint in the light most favorable to the plaintiffs, plaintiffs are alleging that he was a sword; that he affirmatively took steps to cause, contribute, exacerbate, and prolong.

And when Your Honor wanted to know why it was so important that there was a boil water notice alert for pregnant women and for children and why does that matter? It matters because that prolongs, it contributes to, it exacerbates. If Mr. Craig knew in 2011 that Flint (sic) was a hotbed -- I'm sorry; I apologize for saying "Flint" -- that Jackson was a hotbed for lead poisoning and that kids in Jackson could be hurt, and if he knew in 2015 that there were exceedances in the water that went above the 90th percentile, which requires notice by the EPA to be posted on the website, to be put in a newspaper.

If he knew all of that and as an officer and as the delegated officer from the Mississippi State Department of Health knew what the dangers of lead are, which is pled in the complaint that he did, how in the world would he not know that boiling lead-contaminated water would make it worse; that it would concentrate the lead in the water?

And so to the extent that Mr. Mitchell or anyone from the city wants to argue that what plaintiffs are really saying is that Mr. Craig was required to protect them and protect their bodily integrity as a shield,

consider what that notice did for anybody who read it and followed it. Craig knew lead was bad, he knew it was bad for kids, he knew it was present in the water, and then he told children and pregnant women to boil it and make it worse before drinking. That's a sword, Your Honor, not a shield.

There's a number of cases that the defendants cited in their brief, and I'm happy to go through them about why the defendants are wrong. But to the extent that we've addressed them in our briefs, we think our briefs are very on point in terms of distinguishing the facts of those cases in the way the defendants described them versus what those facts really mean. Those are Supreme Court cases.

But to the extent the defendants have argued the Fifth Circuit has never recognized situations like this, the cases they cite are simply not on point, and we can start with *L&F Homes and Development, LLC versus the City of Gulfport*. What the defendants want you to believe is that circumstance is the same here, but that circumstance dealt with property rights. It dealt with property rights, and there the court analyzed whether the developer of a subdivision had a property interest in a new, as opposed to a continued, water service. Unlike our 1983 claims against Mr. Craig, which are involving to be free from the government causing bodily injury. Property interests are

matters of state law. This is what the court found, and they stem from independent sources such as state statutes, local ordinances, existing rules, contractual provisions, or mutually explicit understandings.

There -- even though the outcome is good for what the defendants want you to believe it stands for -- in determining that the developer had not shown it was deprived of a property interest in the continuation of existing electrical service, the court declined to expand this authority to provide a property right exists in obtaining water service, not just continuing service in place. Therefore, not only did *L&F Homes* deal with a totally distinct issue of whether a subdivision has a property interest under state law in obtaining water service, but to the extent that it's relevant at all to the issues in this matter, the court's recognition of a property interest in continuing electrical and water services actually supports the plaintiffs' interests here.

In *Kaplan versus Clear Lake*, (5th Cir. 1986), the denial of water service did not amount to substantive due process. The holding there doesn't support defendants' argument that plaintiffs have not asserted a recognized constitutional right.

THE REPORTER: Slow down for me, please.

MR. STERN: Sorry.

Just because they found that there wasn't a violation doesn't stand for the proposition that they didn't recognize there's actual -- actually a cognizable right.

And *Collins* was cited at length, and in fact, you know, we received five cases that cited *Collins*. We received them this morning. I didn't get them in advance, and, you know, if we're going to talk about strict compliance of certain things, it would have been nice to receive those cases that are being argued today in advance of today.

But the holding in *Collins* was that the due process clause doesn't guarantee municipal employees a workplace that is free from unreasonable risk of harm. It doesn't bar plaintiffs' claims against Defendant Craig for violating their right to bodily integrity.

The cases cited by the defendants from outside the circuit, from outside the Fifth Circuit are also similarly unavailing. *Brown versus Detroit Public Schools*, neither the text nor the history of the due process clause supports a right to a contaminant free-environment; that's true. But plaintiffs aren't alleging they have a right to a contaminant-free environment. They are alleging Mr. Craig took affirmative actions to increase and to make worse their damages.

I understand that there's some comments that have been made about the concept of state-created danger, and that the Fifth Circuit has rejected it. So before I get into the actual conduct, so -- so let me backtrack a minute.

Clearly the bodily integrity claim is rooted in law both from the United States Supreme Court and the Fifth Circuit and from outside the circuit that it is a constitutionally protected claim. In order to prove a bodily integrity claim, we need to show that it's constitutional protected. We need to know they knew it was something that would be protected, and then we need to talk about the conduct.

We have also made an allegation for a state-created danger claim, and Mr. Mitchell has argued that there is no recognition of a state-created danger claim. The Fifth Circuit has rejected the state-created danger claim, and it just doesn't exist.

In order to prove both a bodily integrity claim and a state-created danger claim, the underlying conduct that needs to be shown is the same. So, first, let me just address when it comes to state-created danger why Mr. Mitchell and his clients are wrong.

THE COURT: Well, before you move there --

MR. STERN: Yeah.

THE COURT: -- because we will talk briefly about state-created danger. But with respect to bodily integrity, do the plaintiffs contend that it's been -- that that claim has been stated specifically enough through their complaint?

MR. STERN: If you read the complaint as a whole, absolutely, Your Honor. And if not, if the Court were to read the complaint and believe under any circumstance that it hasn't been stated clearly enough, obviously it would be permissive for the Court to allow -- especially in this case where there's no statute of limitation issues.

These are minor children who, as Your Honor has discussed at length, when it comes to the state Tort Claims Act claim, they could bring their claims for quite some time from now. And so I 1,000 percent believe that the way the claims have been alleged, when reading the complaint as a whole, satisfy what's required under bodily integrity. But if the Court were to find that they're not, providing leave for plaintiffs to amend the complaint to further satisfy whatever's required would be completely permissive, and we would ask the Court to do so. Although, we don't think it's required. When it comes to -- if you'll just give me one second, Your Honor.

Before I get to the state-created danger, in order to satisfy in addition to the -- to the allegations about

what Mr. Craig did or didn't do, in order to satisfy the bodily integrity prongs, one of the things that is required is to show that the rights were clearly established. And one of the things that Mr. Mitchell, he didn't -- he didn't go into great detail about it, but he certainly spoke about it, was that it wasn't clearly established in 2015 and 2016. He cited *Guertin* where the plaintiffs cite this case from the Sixth Circuit that had to do with the Flint water crisis, and how in the world could Mr. Craig have known at that point in time that these were clearly established rights when that case, when that decision came after what happened here.

But the level of specificity that the defendants are suddenly requiring the plaintiffs to show to show it was clearly established is -- it's -- it's -- frankly it's ridiculous. *Doe versus Taylor Independent Schools* from the Fifth Circuit, this is a quote, "The term 'clearly established' does not necessarily refer to 'commanding precedent' or that is 'factually on all-fours with the case at bar' or that holds the 'very action in question' unlawful. Rather, a constitutional right is clearly established if 'in the light of pre-existing law the unlawfulness is apparent.'"

Put more simply, officials have to observe generally well-developed legal principles. Fifth Circuit precedent

establishes a right to bodily integrity and includes the right to clean water long before the conduct at issue in this case, and that's even far greater than what the plaintiffs are alleging was their right to bodily integrity.

In *Bradley versus Puckett*, a 1998 case -- which came 14 years before Mr. Craig even found out that lead was going to be something that was a problem for the citizens of Jackson -- the court found that a disabled prisoner's allegations that while on lockdown for possession of a weapon, he was deprived access to a shower chair to prevent him from falling in the shower, and therefore could not bathe for months, stated a claim for cruel and unusual punishment under the Eighth Amendment. The court found that the plaintiff had a valid claim to the extent that he complains of unsanitary conditions that deprived him of basic human needs and exposed him to health risks.

The court explained why the plaintiff adequately stated a claim for a violation of his recognized constitutional rights. The court said, Bradley asserts that he was unable to bathe for several months; that prison officials were aware of his special needs but deliberately ignored them; that he was therefore forced to clean himself using toilet water; and that the unhygienic conditions resulted in a fungal infection which required medical

attention. Therefore, Bradley alleges that the unsanitary condition violated contemporary standards of decency, which threatened his physical and mental well-being.

"Contemporary standards of decency which threatened his physical and mental well-being," that's as early as 1998 in the Fifth Circuit, the circuit the state claims has no precedent whatsoever for the type of bodily integrity claims the plaintiffs make here --

THE COURT: But this is not an Eighth Amendment claim, is it?

MR. STERN: It's not. It's not.

THE COURT: I know it's not, I mean. And the courts have gone from -- you have to allege stuff and you have to -- you cannot allege it in generality. Qualified immunity sort of cases out there that it's tough to allege a right. You have to look at everything, and some cases suggest that you must find a case from a particular circuit from the Supreme Court that's exactly like the one before you.

MR. STERN: I understand that some cases say that. But to go back to that case and then to address Your Honor's point, as early as 1998 precedent in this jurisdiction existed which put any reasonable water official on notice that conduct such as what plaintiffs allege here in their complaint could have violated bodily

integrity. But because the material precedent is not a requirement in the Fifth Circuit, state officials can still be on notice that their conduct violates established law even in novel factual circumstances, and that's M*cClendon versus City of Columbia*, (5th Cir. 2002).

Again, this is a quote. This isn't a Corey Stern quote, this is from *McClendon*. State officials can still be on notice that their conduct violates established law even in novel factual circumstances, 305 F.3d 314 (5th Cir. 2002).

And while the defendants are correct that the Sixth Circuit's decision in *Guertin* came after the alleged conduct that plaintiffs describe here in their complaint, they are right. They are 100 percent right. *Guertin* did not occur in a vacuum. What the Sixth Circuit relied on in coming to the decision in *Guertin* is this same case law that this court should and must rely on to come to the same decision here. They cited the Supreme Court cases that we cite in our brief. Those all came before 2016.

Those all came before *Guertin*, and so it's not a matter of just looking at *Guertin* and saying, well, *Guertin* happened, so Mr. Craig and Mayor Yarber and Utilities Director Powell and Utilities Director Miller because of *Guertin*, if this had happened after *Guertin*, they would be put on notice. No, the same analysis that the *Guertin*

court undertook in analyzing United States Supreme Court precedent on the issue of Fourteenth Amendment bodily integrity is the same analysis that this Court should undertake now. So don't -- if Your Honor would indulge me, we're not asking you to look at *Guertin* and say Craig was on notice. We're asking you to look at *Guertin* and see how that court came to its decision, because the facts there are materially similar here, but you don't need *Guertin* to make the finding.

All right. Getting back to the issue of state-created danger. It is true, it is 100 percent true as Mr. Mitchell said the Fifth Circuit has not yet adopted the state-created danger theory. And just to go back one second, it is absolutely true that the government is not required to protect individuals from dangers. Again, it's not a shield. It's not required to protect.

What the state-created danger theory is, it's an exception to that rule, but it has not ruled -- the Fifth Circuit has not ruled that courts should throw out such claims on that basis alone.

THE COURT: But it has never found a state-created danger --

MR. STERN: Not yet.

THE COURT: -- no matter how bad the facts were.

MR. STERN: Not yet but --

THE COURT: You think this case right here would be the case?

MR. STERN: Yes, sir. It has outlined the contours of state-created danger theory, and more importantly at the motion to dismiss stage, the Fifth Circuit should take the light most favorable to the plaintiffs. And so here using what the Fifth Circuit has said is the way you can do a state-created danger, even though they haven't yet. Plaintiffs meet even the strictest view of the state-created danger theory.

Under the strictest view, here's what plaintiffs need to show: state actors were deliberately indifferent. We'll get to that in a minute, and I guess I'm jumping back to jump ahead. But let's assume for a minute that we're able to convince Your Honor that these actors were deliberately indifferent, that means -- and I'll get to it in a minute -- that they knowingly disregarded a risk. There's nobody that can read the complaint to read that Mr. Craig or any of the state officials didn't knowingly disregard the risk. They all knew of the risk in 2011.

In fact, in 2013 Mayor Lumumba's -- and I don't want to butcher his name -- his father, senior, as well as the at-the-time-acting director of the utilities, they created a plan to address the risks that in 2011 they were made aware of. So nobody can argue they didn't deliberately

ignore a risk that existed, and reading the complaint clearly says that.

But separate and apart from the deliberate indifference prong, they increased the danger that a known person or a class of persons would be harmed by a third party. So here's the test, this is what the Fifth Circuit says is the test that has never been met before:

One, the actors were deliberately indifferent.

Two, in a way that created or increased the risk of danger that a known person or a class of persons would be harmed by a third party.

The known class of persons, I mean, to the extent that Mr. Mitchell claims that the -- the MTCA notice is deficient, which obviously we don't agree with, I think it's pretty clear that the notices are for kicks. I think it's pretty clear from the complaint that all of the allegations are being brought on behalf of children. I think it's pretty clear from a plain reading or an expansive reading or whatever reading anyone wants to take of the complaint that we are talking about a very specific segment of the population.

The complaint doesn't say that property owners have been harmed because of property damage contributing to the diminution of value.

THE COURT: Well, I'm going to interrupt you there,

because I'm thinking about the *Doe versus Covington County* case here out of this division that went up to the Fifth Circuit. I'm not sure if it was cited in the briefs, but I always think about that one when I think about state-created danger. A child in a school where the school has a policy that says only a particular list of persons of names that we have, we require you to tell us who we can let your child go to, so it's there to protect that child that's in that school at elementary school.

But for many times on several days, the school authorities allowed an unidentified individual to come take that child out of school and rape her repeatedly on a number of different times. The Fifth Circuit said that was not a state-created danger.

MR. STERN: Correct.

THE COURT: So how do we -- how can I say that that one child -- because that's a school, that's an elementary school. You're talking about much less than the City of Jackson. You're talking about specific policies in place at a specific school for those specific children. A policy in place for the child identified third parties who might harm the child -- that would be people who are not on this list -- and then they allow a person to come in and take that child out of school several times, and on each occasion, that person raped that child. And that's not a

state-created danger, so how could this be?

MR. STERN: So despite the facts of that case -- and I'm trying to represent my clients as best I can, and I don't want to diminish what they've been through. None of them have been through what the child in that case has been through, and so I'll say that up front.

The difference, however, in distinguishing this case from that situation is the culpable knowledge and conduct. It's the knowingly disregarding a risk. That conduct was awful. What happened to that child --

THE COURT: The knowing disregard of the risk in this state if you allow a child to go home with a stranger or a child to go home with a nondesignated person on that child's list. If they say that Corey Stern is the only someone who can pick up my child, and then they allowed John Doe to pick up the child -- I don't want to -- I was about to say some others --

MR. STERN: I don't think of them like that. These are all decent human beings.

THE COURT: And they allow -- and they look at the list, and the person identifies himself as Tommy Keys.

MR. STERN: Yeah.

THE COURT: And they say, Tommy Keys, your name is not on the list, but you claim to know this child.

MR. STERN: Sure.

THE COURT: And they let him, and they let Tommy Keys get the child.

MR. STERN: So here's the difference, if Your Honor, again, would indulge me. Separate and apart from the conduct, if you had allowed -- if you were the school and you had allowed Corey Stern or you had allowed Meade Mitchell or you had allowed any one of these lawyers to pick up the child, that is not a known risk. It may be a bad policy.

It may be bad to let a stranger pick up a child, but I would submit to the Court that I hope I live in a world where most strangers are decent human beings. Where not everyone who is a stranger would necessarily rape a child.

Here, there's no dispute that it was a known risk. There's no argument that anyone can make that lead is not a neurotoxin. There's no argument, at least based on the way the pleadings contain allegations, that it wasn't known to Mr. Craig or any of the city officials before any of this happened that Flint (sic) was at risk of significant lead poisoning. And so I would simply submit to the Court that that case is different from this case, because there a woman who -- or a man who sat at the front office of that public school and allowed that child to go to this person who they may or may not have known was a stranger --

THE REPORTER: Slow down, please.

MR. STERN: -- could never have known.

THE COURT: Well, but they knew that person's name was not on the list.

MR. STERN: They knew the person's name was not on the list, but they didn't know that the person was a rapist.

THE COURT: No, it doesn't matter. They allowed the child to go with somebody whose name is not on the list.

MR. STERN: I would submit to the Court that that doesn't rise to the level that this does in terms of disregarding a known risk.

THE COURT: The risk of letting a child go with a stranger, a person that cannot be identified by the school officials is a known risk.

MR. STERN: This isn't going well for us, so I'm going to move on. What I will say, though, is that I would couch it differently, Your Honor. I would say that the known risk of sending a child with a rapist is different than sending a child with a stranger.

THE COURT: Okay.

MR. STERN: But I'm not going to die on that hill, not today.

THE COURT: All right. All right.

MR. STERN: And when we get to conduct, and then here's where we'll put state-created danger in a box

somewhere and not light it on fire yet, but I see the gasoline.

Then the standard to determine whether Mr. Craig's conduct was objectively unreasonable is the deliberate indifference standard. Mr. Mitchell says that and I say that, but we say what that means is something different.

The second part of the qualified immunity analysis is only for the Court to determine, in the lights most favorable to the plaintiffs at this stage, that the conduct of the defendants was objectively unreasonable when applied against the deliberate indifference standard. And that's from *Hernandez* which is 380 F.3d 872 (5th Cir. 2004), and here's what *Hernandez* says: "To act with deliberate indifference, a state actor must consciously disregard a known and excessive risk to the victims' health and safety."

A state actor -- Mr. Craig is a state actor; nobody disputes that -- must consciously disregard a known and excessive risk -- the complaint says that Mr. Craig was there in 2004; he was there in 2011; he was there in 2015; he was there in 2016. And as early as 2011, he would have known there was a substantial risk of lead poisoning in the City of Flint, (sic) and he knows that that's a risk to the victims' health and safety. It's as easy as that.

Deliberate indifference, furthermore, Your Honor, is

determined by a subjective standard of recklessness. Not objective, subjective, and the Fifth Circuit has explained, and this is in *Atteberry versus Nocona General Hospital*, that's at 430 F.3d 245. It's a Fifth Circuit case from 2005, that the test for deliberate indifference is subjective rather than objective in nature because -- and this is important -- "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."

Here, Mr. Craig took affirmative steps. The allegations of the complaint is that he made it worse. He exacerbated it; he prolonged it. Under these standards, a state official will be denied qualified immunity if the evidence showed that she or he merely refused to verify underlying facts that he strongly suspected to be true -- we don't think he suspected them to be true, we know he knew them to be true -- or declined to confirm inferences of risks that he strongly suspected to exist. And that's also from *Hernandez* at page 884.

There's also a case that we submitted to Your Honor, I think it was in August of 2022. We sent a letter and copied opposing counsel about a case that wasn't included in our briefs that we wanted the Court to consider, because it came out at a time prior to or subsequent to when we

would have filed the briefs on this. And that case is *Harris versus Clay County, Mississippi*, and it is the United States Court of Appeals for the Fifth Circuit Case No. 21-60456. We provided the opinion to the Court, and to boil it down, what that case says is that lying alone or being disingenuous or misleading -- misleading is enough to cause a constitutional violation. We've alleged way more than misleading. We're alleging that he knew, that he prolonged, that he intentionally, that he willfully, that he created something to undermine what the test results really would have been, that he deliberately did things so that people wouldn't know. But misleading -- misleading in and of itself warrants a constitutional violation, especially at this stage.

I've got a lot more in the binder. I could have gone on and on about the -- the trash can gasoline issue. But if Your Honor has questions, it may be appropriate at this time for me to try and respond.

THE COURT: I just -- and you can be as brief as you need. What's your response to why the discretionary function exception does not apply --

MR. STERN: Sure.

THE COURT: -- to this state defendant?

MR. STERN: Sure. So it's a two-part test, and number one, you have to show that the purpose of

discretionary function is not to protect all decisions. And so I picked up on something Your Honor was talking about with Mr. Craig. At one point, Your Honor asked if this was a low-level city employee or state employee who was fixing something on the street, perhaps the -- the immunity wouldn't apply.

But here for Mr. Craig, wouldn't anything be considered a policy decision, and the reality is that not every decision made by a high-level official meets the test. So what the Court has to first ascertain is whether the activity in question involved an element of choice or judgment. I don't think anybody contends that what Mr. Craig did or didn't do, as pled in the complaint, consisted of activities that required some element of choice or judgment. We concede that, and I think the state concedes that as well. You have to show that.

But then the second part, this is -- this is where it's not mutually exclusive. You can find -- the Court must also decide whether that choice or judgment involved social, political, or economic considerations. What is the social or political or economic consideration of misleading the people of Jackson?

What is the social, political, or economic consideration for telling pregnant women and parents of children that they should make their kids water worse and

then have them drink it?

What is the social, political, economic consideration of waiting six months to post on a website information about the test results and to post in the newspaper where folks from Jackson can find the information about their test results?

I would submit to the Court that while prong A is clearly met, prong two is not. There's no political, social, or economic consideration that went into what we allege Craig did or didn't do, in the same way there was no political, social, or economic consideration that went into what we allege the city actors have done.

THE COURT: Okay. And, finally, with respect to you've been talking about the Sixth Circuit case --

MR. STERN: *Guertin*.

THE COURT: -- the *Guertin* case. But what might be your best Fifth Circuit case that might have put Craig or the other defendants on notice that --

MR. STERN: Oh, there are so many.

THE COURT: -- that there are acts --

MR. STERN: Sure.

THE COURT: -- that you allege were unconstitutional?

MR. STERN: I think the case -- and I'll give you a series of them because the -- one issue I didn't address

that encompasses an answer to your question, Your Honor, is that one of the other things Mr. Mitchell stated on the record was that there's never been a case that in order to find a violation, you have to find a physical touching.

And so the progeny of cases that we cite, starting with *Tyson versus City of Sabine*, the contention that direct physical contact is what distinguishes a viable bodily integrity claim from a meritless environment claim is for naught. I'm asking you to read that case not in the way they want you to read it, but in the way that we distinguish it in ours.

In rejecting that very contention, the Fifth Circuit stated, "Defendants argue that the alleged sexual abuse doesn't shock the conscious because Deputy Boyd did not effectuate using physical force." We disagree; physical force is not a requirement of a violation of the right to bodily integrity.

THE COURT: I agree with you on that point. I'm going to see if they -- I'm not sure if that was responded to in the rebuttal. That's *Tyson versus City of Sabine*?

MR. STERN: I can do *Doe versus Taylor Independent Schools*, deliberate indiff -- I'm sorry.

Let's go with *Atteberry*. *Atteberry* is the case where there's a nurse who -- who poisons a bunch of people. And in that case, what the Court says in Atteberry is the

constitutionally concerning conduct of the nurse was not the unwanted physical conduct that occasioned the injection. Rather like here, the concerning conduct was the harmful substance that she injected into the patients, a paralytic drug introduced into the body of 22 patients.

Similarly, here, the City of Jackson caused -- caused a neurotoxin to enter into the body of plaintiffs. Mr. Craig caused a neurotoxin to prolong being exposed -- these children to being exposed and ingested by the plaintiffs. And so all of the Fifth Circuit cases, honestly, cited by the defendants, if you read our brief and the way we've distinguish them, they don't stand for the propositions of what defendants claim they do.

In fact, the idea that the Fifth Circuit hasn't recognized a right to bodily integrity or that a neurotoxin or a toxin of any sort would be considered a violation of -- of bodily integrity is simply wrong. The very cases that they cite on this point actually support our arguments, if not forever, at least at this stage.

THE COURT: Thank you, Mr. Stern.

MR. STERN: Thank you.

THE COURT: Mr. Mitchell, briefly I think --

MR. STERN: May I ask one more thing? If -- if Your Honor is -- I'm sorry. I said I was done. If the cases that were presented and given to Your Honor this morning as

persuasive, which were presented to us for the first time as well, I haven't had a chance to look at them. And if Your Honor's going to hang a ruling in any way on any of these cases, we would just respectfully request the opportunity to respond.

THE COURT: Trust me, I have not looked at them either.

MR. STERN: Okay. Thank you.

MR. MITCHELL: I'll be brief, Your Honor, or at least I'll try to be.

THE COURT: Let me ask you that point about the physical force thing, too. Whether physical force is not a requirement of a violation of the right to bodily integrity that was cited in the plaintiff's opposition, and I'm not sure if, in your rebuttal, you either agreed with that or disagreed. Because as I said, I see that quote from *Tyson versus City of Sabine*, which is a 2022 case from the Fifth Circuit, 42 F.4th 508 at 518.

MR. MITCHELL: No, I can't say that a direct physical force is an absolute requirement under our case law. That's generally the case.

THE COURT: Okay.

MR. MITCHELL: But very much generally the case, and it seems to be the exception where that does not occur. That -- that's my position.

THE COURT: Okay. All right.

MR. MITCHELL: You know, Mr. Stern described the actions of Mr. Craig in a very egregious way, and in a way that I think is not consistent with the allegations of the complaint.

I believe that I described the allegations that are asserted against my client fairly and accurately, and I stated the paragraphs that the -- the sections of the complaint that are there. But regardless of the way he described them, even if you accept that as true, which I don't think it is because those are labels and conclusions that are not supported by the factual allegations of the complaint. But even if you accept it as true, the way he described the actions of my client, those are not clearly established constitutional violations.

Over and over again I kind of heard that it was my job -- that he was distinguishing the cases that I said supported my position. It's not my job to submit cases that refute his position. It is his job, it is Mr. Stern's job to submit cases that support his, and he didn't. And he didn't do it, and he couldn't do it. And it's not because he's not a good lawyer, it's because the cases don't exist, Your Honor.

This is a 12(b)(6) motion; we look at the law that exists right now. They had the burden of coming forward

with the case law to support their theory. And they simply can't do it, because there's not any case law that says when you use a different test method than a letter in 2008 to the Washington DC group that said you weren't supposed to use, that that's violating clearly established due process rights under the constitution.

There's not a case that suggest that if you're late in issuing a warning that you violated due process rights in the U.S. Constitution. In fact, there's a lot of cases that say failure to warn never does it.

There's not a case that says if you -- if the content of your boil water notice was not right on one occasion, that you've violated due process rights under the United States Constitution. It's not there. It's not there.

They continued to press for the state-created danger theory. Judge, I think you heard it, I'll say it. I think they suggested the Fifth Circuit was just waiting for the right case, that's not what I see at all. I see that the Fifth Circuit is not going to recognize this claim, and I will tell you if it ever did, it was not a recognized claim in 2015 and 2016. And that's fatal to their case, because if it's not clearly established in 2015 and 2016, it couldn't put Mr. Craig on notice. The *Chavis* case actually said that.

Even if it were recognized, they haven't pled all the -- the potential elements of that plausible claim. They haven't shown that we used -- that Mr. Craig used his authority to create the dangerous environment. Mr. Craig didn't create anything. They have alleged that the lead levels in Jackson's water were from old pipes and corrosive water sources; he didn't do that.

They have to allege that he -- that there was -- that he was aware of an immediate danger to a known victim -- a known victim. Now, all they've alleged is a geographic class of people. It doesn't satisfy the elements. It's not going to be recognized. The claim should fail.

Bodily integrity, it is not our position that a constitutional right to bodily integrity does not exist; it is not. It is our position that a constitutional right to bodily integrity does not exist as to the facts pled against Mr. Craig, and certainly it was not clearly established at that time.

Yes, we contend that the bodily integrity right that they plead is a right to safe drinking water. We didn't bring that up out of nowhere. The *Guertin* case that they talk about so much that I disagree with -- I disagree with the majority in the *Guertin* case. I believe that the dissent in the *Guertin* case was a far more reasoned

analysis than the majority. The majority -- the dissent in the *Guertin* case described allegations in the complaint very similar to the allegations in this case as plaintiffs asserting a right to contaminant-free water, and they rejected it. The same argument that I'm making, the same kind of facts, that's what I believe they've pled, and they're not --

THE COURT: Do you have a right to be free from people misleading you --

MR. MITCHELL: No.

THE COURT: -- about what the water is?

MR. MITCHELL: No. That's the warning cases that I just told you about.

THE COURT: You don't have a right?

MR. MITCHELL: No, not a -- not a United States Constitutional right under the due process clause of the Fourteenth Amendment, and that's what they've alleged. And that's what the *Collins* case says, you don't have a right to those kind of warnings under the Constitution --

THE COURT: Even though --

MR. MITCHELL: -- of the United States.

THE COURT: -- it invades your bodily integrity.

MR. MITCHELL: No, they're not recognized as bodily integrity invasions. That's the point of the *Collins* case; they're not recognized as invasions of bodily integrity

under the United States Constitution because they're -- that's -- that's what all of those cases say, the *Collins* case and those that I gave you.

Now, even if you say I don't really think they're claiming a right to safe drinking water, they still haven't provided cases supporting their claim that the bodily integrity right under the constitution should be expanded like this. It's got to be a clearly established constitutional right.

You've written so many opinions on this; I've read them all. I mean, it has to be very clear law, very clear law that would put any official on notice that he was violating the law. None of the cases that they've cited does that.

They've cited the *Bradley* case, which is a prisoner case about not allowing a prisoner to bathe, and the guards making him drink out of the toilet. That's nothing like the allegations against Mr. Craig.

They talk about sexual abuse cases, the *Taylor Independent School District* that's nothing like the allegations against Mr. Craig. They talk about -- one of the things they talk about is a student was tied to a chair by a teacher with a jump rope. That's nothing like the allegations against Mr. Craig.

They cite a couple of U.S. Supreme Court cases,

Cruzan and *Washington* about the patient can refuse medical treatment. Okay. And that, you know, there's a long list of cases that supports the right to refuse unwanted medical treatment, but the reasoning of those cases is that making them take it is considered battery. You can't force them to take medication if they don't want to take it. It's a recognized bodily integrity right. Those cases are nothing like the allegations against Mr. Craig.

THE COURT: If you're providing the citizens of Jackson contaminated water, is that the equivalent of battering them?

MR. MITCHELL: No.

THE COURT: Okay.

MR. MITCHELL: We didn't provide the water, and we're not alleged to have, anyway, Your Honor, but, no.

And then the case they claim is on point: *Guertin*, that's the Flint, Michigan case. This is not Flint, and the allegations in this case aren't Flint. And if you read the *Guertin* case carefully, you'll see this case is not Flint. And as I mentioned to you before, that decision is flawed, and the dissent there is more logical we believe.

But moreover, Judge, moreover, the factual pattern is not the same as to Mr. Craig. First of all, let's look at what they did recognize. The bodily integrity right that the court recognized was that, "A government actor

could not knowingly and intentionally introduce life-threatening substances into an individual without their consent." Mr. Craig is not alleged to have knowingly and intentionally introduced anything into the plaintiffs.

Second of all, in Flint, the state MDEQ had taken over the Flint water system, and the decision states that the MDEQ was instrumental in authorizing Flint to use an ill-prepared water treatment plant to distribute water from a river it knew was rife with public health compromising complications. And it then said that the MDEQ falsely assured the public the water was safe and tried to refute assertions to the contrary. That is nothing akin to the allegations against Mr. Craig.

Citing bodily integrity cases at a high level of detail, at a high level of generality doesn't do the job. You have to have highly specific case law that would put the official on notice. Precedent must put the existence of that constitution right beyond debate.

And be careful here, Your Honor, in doing what they ask, because suddenly every failure to warn case by every government official is a constitutional violation, which is exactly what *Collins* said shouldn't be. It could open the floodgates of 1983 litigation. It's contrary to the admonition not to expand constitutional rights. It's contrary to what the *Collins* decision said.

I know that the plaintiffs don't like our arguments and -- but we're arguing the law. We're making arguments premised on very clearly established 1983 law, and they have failed to set forth a viable, cognizable legal claim. And I suggest that the emotionally charged arguments seem almost to be a suggestion to disregard the law and that -- the law governs this case, Your Honor. The law is clear.

Given the legal landscape in this case, Mr. Craig would have had no notice that his alleged acts selecting an alternate water sampling method, issuing a late notice, or ignorance of the effect of lead concentrations in a boil water notice were objectively unreasonable under clearly established constitutional law.

THE COURT: When did Mr. Craig begin the first set of testing?

MR. MITCHELL: The allegations are that he did it June 23rd and the 24th and maybe 25th --

THE COURT: Of what year?

MR. MITCHELL: Of 2015. Sorry.

THE COURT: 2015?

MR. MITCHELL: Yes, Your Honor.

THE COURT: Do the allegations allege when he first should have done it? He was doing them triennially; right?

MR. MITCHELL: There's no allegation about when --

THE COURT: Okay.

MR. MITCHELL: -- or doing the testing at the wrong time. It's just that he reported the results late.

THE COURT: Okay. All right. You heard Mr. Stern's response to the questions. I'm turning to the state tort claims notice, and, again, I'm looking at what the statute requires. And I guess you still contend that they don't have sufficient information according to what the statute says, "Contain a short and plain statement of the facts upon which a claim is based, including the circumstances which brought about the injury."

I think the claim says drinking the water brought about the injury. The extent of the injury, they list all those possible claims that they might have. The time and place of the injury, the time didn't say a specific day. The place is Jackson presumably. The names of -- it does say the names of all persons known to be involved. All persons, so that would include if the child did not -- under the state's theory, I assume if the child did not list all those persons who were aware of the sort of defects that they might have been suffering from, if the child was in school, each teacher might have been aware that the child was in the old -- in the old broad words, was a little bit slow or he didn't act this way or do this this way and all that.

If they did not have that information when you --

when the statute says "all persons," would that turn any notice that they have to one which has not substantially complied?

MR. MITCHELL: Well, Judge, first, obviously if they don't know about persons that are involved, they can't identify them, so that doesn't necessarily violate the statute. If you don't know, you don't know.

THE COURT: No. No. I'm talking about if you do know but you don't list.

MR. MITCHELL: Well, then --

THE COURT: If you don't list all the school teachers who may know.

MR. MITCHELL: Your Honor, I don't believe -- I don't believe that substantial compliance with the names of all persons known to be involved would include such a broad listing. I think it would include the parents and the people that live with the child in the home.

But I -- but what I did really hear, Judge, I heard some incredibly troubling things that I thought Mr. Stern was saying. I heard that some of these children may not have manifested an injury. You know that we can't -- you can't bring claims in Mississippi based on fear of disease. If it hasn't manifested, if they're not injured, they shouldn't be here. I heard --

THE COURT: Well, that would -- that would be

something you would bring to the Court; right?

MR. MITCHELL: Well, that would be something that I could and I would and I might if they include it in the notice, but of course, they haven't.

The other thing that I heard is they may not have even hired people to determine whether or not they're injured. Wow, really? Why are they here in this court system if they haven't done that?

Yeah, it's expensive. Sure, it costs money to get a diagnosis, but without one, they shouldn't be here. This is a court we need -- the court should, always should afford people that are injured rights to have their claims litigated in court. But they must be injured, Your Honor, and that needs to be established, and, yes, that needs to be set forth in these notices.

But what he said about that was so troubling to me, that maybe they haven't even done that, had anybody determine whether they're injured. Does that mean that every child in Jackson is just going to start filing their cases here whether or not they've ever been exposed to lead --

THE COURT: And discovery --

MR. MITCHELL: -- whether or not they --

THE COURT: And discovery will reveal, would it not?

MR. MITCHELL: No. They still --

THE COURT: Because they have the burden of proving it. They have the burden of proof.

MR. MITCHELL: They have the burden of proof, but they have -- they have a burden before they enter this court to tell us if they actually have an injury. That's what this --

THE COURT: They have --

MR. MITCHELL: -- statute says.

THE COURT: -- the burden of proof. So if they give you the names and they say this Person X is injured because of the water, that would be enough if they showed they have some sort of affidavit from somebody. When, in fact, after discovery begins, you may develop the theory that, no, it's not because of the lead that came from the water. It's from the lead that came from their house in their paint; the child routinely ate paint chips.

But that would not mean that that case cannot move to court, would it not? I mean, if he had that information?

MR. MITCHELL: Well, that, you made -- you stated a good point.

THE COURT: Because you all are going to depose these people, --

MR. MITCHELL: You stated an excellent point, Judge.

THE COURT: -- and you're going to argue about every

injury they had. And you're going to say, no, you're not -- your mental stuff is not based on having drank the water, its because of something else. It's congenital, it's hereditary, it's all of that.

But that gets them to the court at least; right?

MR. MITCHELL: But what you just said is very important. We might dispute what caused the injury --

THE COURT: You will.

MR. MITCHELL: -- but what got them into court is identifying an injury to begin with; and that's what they have failed to do. They have not identified an injury to begin with. We're not to the disputing what caused it phase. We're to the did you give me notice that you even have one phase, which is what they were required to do under the statute.

And if it hasn't manifested, if they don't have anybody that says they're even injured, they shouldn't be in this court. And that's what these notices will tell me and allow me to evaluate and consider these claims, and that's what the law requires.

THE COURT: So how -- I'm just asking is this going to end up being 1,000 individual claims or 800 or 600 individual claims?

MR. MITCHELL: What do you mean, Your Honor? I'm sorry. I didn't --

THE COURT: There are 800 different plaintiffs. There are 600 different plaintiffs, when they go back and do everything like you want to do, maybe the list comes down to 350. Are they going to pursue a lawsuit on each one of those separately?

MR. MITCHELL: Oh, I don't know how they would refile them. I think they could refile them en masse like they've done here. I think they could do that.

I think -- I think the real potential here is that you might see less plaintiffs coming back into this system, or at least I will be given the notice about whether they have legitimate claims.

THE COURT: Okay. All right.

MR. MITCHELL: The other issue is a policy -- Judge, I think I've covered the policy issues enough. I mean, it's under the MTCA. Again, you know, we don't have to prove the actually considered policy implications. The posited conduct only has to be susceptible to policy analysis. You know, the federal and state drinking water acts give really broad discretion and supervisory powers to the state in regulating drinking water issues; that broad discretion creates a strong presumption that the discretionary acts involves some consideration of policy.

So, again, applying these legal principles, the state defendants' acts in overseeing the water supply, the

decisions they made on testing methods, timing of reporting, and content of boil water notices were decisions made by individuals charged with the responsibility for those decisions, and they involved policy.

There's cases -- there are a number of cases out there that talk about that. The *Dancy* case, which is a 2006 case, it says, "Government conduct involves policy consideration when the activities 'emanating from or relating to matters of human welfare.'" That's what these are.

There's a number of cases that are cited and explained in the brief that describe the difference between what is a policy decision, which is entitled to immunity, versus what is a simple negligence decision by some -- perhaps a lower-level person failing to do something, some particular act.

THE COURT: Make sure you stay on the microphone.

MR. MITCHELL: Oh, again, I apologize, Judge.

This is -- you know, without going into a lot more detail, the *Smith* case they cited, which is a 2020 case; the Simpson County case, which is *Simpson County versus McElroy*, 82 So. 3d 621, another 2011 Mississippi Supreme Court case, all support our arguments that the actions of Mr. Craig here in this situation were policy considerations, and he's entitled to immunity.

I'll add one last thing. They said if they hadn't stated the claim right, they'd like a chance to amend it. The -- the claims against Mr. Craig, no matter how many times they amend, are never going to be clearly established bodily integrity constitutional rights. Any amendment, Your Honor, to add more verbiage about how bad it was is not going to -- is not going to remedy or solve any problems they have. These are not clearly established constitutional claims. They were not clearly established at the time of Mr. Craig's act. Any amendment to try to add words would be futile, and we would oppose that.

THE COURT: All right. Thank you.

Candice, how are you doing?

THE REPORTER: I could use a break.

THE COURT: We're going to take a five-minute break, and then I'll turn to the City of Jackson. And I don't think the rest of them will be as lengthy, because we've covered a lot of ground with respect to this. But I will give you an opportunity to make your full argument that you think you need to make, and I'll have a few specific questions I think. But we're going to take about a ten-minute break.

My goal is to -- I have another obligation at 2:00. And so my goal is to be done long before then, so that the court reporter can get a lunch break as well. We'll be in

recess.

MS. SUMMERS: All rise.

(A brief recess was taken.)

THE COURT: You may be seated.

Mr. Webster?

MR. WEBSTER: Thank you, Judge. Clarence Webster for the plaintiff. I understand there are some time constraints here --

THE COURT: I'm not going to -- you know, I'm going to give you an opportunity to make your argument.

MR. WEBSTER: Yes, sir. But for one thing, the City of Jackson along with the individual defendants who are connected to the City of Jackson, we filed a joint answer, and there is some overlap between our various arguments. And even though the City of Jackson doesn't have a qualified immunity defense, there are some arguments with regards to whether there's a constitutional violation, what was established at the time these things happened.

There's some overlaps, so I will spend the bulk of my time talking about the legal issues and whether there was a constitution violation. And then counsel for the individual defendants will deal with the specific conduct of those individuals as alleged in the complaint.

Understanding the Court's time, because I think we can get this done, I think I will start with the easy issue

first and then we work backwards.

THE COURT: Okay.

MR. WEBSTER: And the easiest issue is we didn't get 90 days notice of the negligence claim in the cases filed in case numbers 21-663 and 21-667.

THE COURT: Okay.

MR. WEBSTER: Plaintiffs acknowledge that. They served the notice on one day, and they filed the complaint on another. There's one remedy for that, the claims have to be dismissed. The plaintiffs argue, without citing any cases, that consolidation somehow cures the issue, but Mississippi law is clear that there's no procedural cure or substantive cure for failure to give notice. So those claims go out the window or those claims are out right now. And this is not just an academic exercise, because there are named plaintiffs in this case who are currently over the age of 21 based on the demographic information that we have.

All right. These --

THE COURT: So you would move to dismiss those plaintiffs?

MR. WEBSTER: Yes, sir.

THE COURT: Okay. So --

MR. WEBSTER: We would move to dismiss all of the state law claim -- well, the negligence claim in all of the

21-663 and 21-667 cases, so the two cases that were filed in '21.

THE COURT: Okay. So they would be dismissed without prejudice but not without consequences --

MR. WEBSTER: Yes, sir.

THE COURT: -- which would sort of be your argument.

MR. WEBSTER: That's the argument, yes, sir.

THE COURT: Okay. Because for those who are still less than 21 or whatever that magical age is --

MR. WEBSTER: Yeah, we'll cross that bridge when we get there, when they refile.

THE COURT: What about those -- okay. But you've had them 90 days now; right?

MR. WEBSTER: The notices -- the notices of -- we have not received proper notices, no, sir.

THE COURT: You have not received the notices of claim?

MR. WEBSTER: We have their notices now, Your Honor.

THE COURT: Okay.

MR. WEBSTER: Yeah. And --

THE COURT: You received them, but they filed suit one day later you're saying?

MR. WEBSTER: That's correct.

THE COURT: And those notices of claim, you do have those?

MR. WEBSTER: We do have those, yes, sir.
THE COURT: All right. Now, help me out with this other issue about whether or not even -- because if these are going to be dismissed, they're going to have to refile them. They're going to have to give them to you.
MR. WEBSTER: Yes, sir.
THE COURT: What do they need to give to the City of Jackson that complies with the Tort Claims Act, 11-46-1?
MR. WEBSTER: Judge, we don't raise that argument. The City of Jackson doesn't raise that argument, so I'm not prepared to speak on it. Our only argument as to why the state law claims should be dismissed in 21-663 and 21-667 is we didn't get proper notice.
THE COURT: Okay. So is it your contention then that the notices that have been provided are sufficient?
MR. WEBSTER: I will say this, Judge. We received the same notices in the 22 cases, and we have not moved to dismiss the negligence claim. Is that fair?
THE COURT: Okay. All right.
MR. WEBSTER: Let's leave it at that. All right? Thank you, Judge.
THE COURT: Thank you.
MR. WEBSTER: So next would be the state-created danger claim, and I think as Mr. Stern said that one's in the box and the gasoline --

THE COURT: The gasoline is burning on that one.

MR. WEBSTER: Okay. Good. All right. Thank you, Your Honor.

All right. So the plaintiffs have filed a very thorough complaint. There's been a lot of briefing and a lot of paper in this case. But the question before this Court on this bodily integrity claim and whether they've pled a violation of bodily integrity is not whether the City of Jackson provided, is providing, has provided contaminated water, which we dispute they have. They have not.

The question is whether the actions of the City of Jackson as alleged in the complaint compelled the plaintiffs to consume water. Not the provision of the water, it's not putting the cup out there in front. It's putting the cup out in front, pointing to it, and saying you have to drink it.

Now, in *Guertin* in Michigan -- and Mr. Stern knows a lot more about that case than I ever will -- the question was or what the court hung its hat on was that the officials up there took away informed consent from the citizens by lying to them. There is no allegation of a lie here. The allegation is --

THE COURT: The water is safe to drink, I've heard that through the mouths of multiple city officials, and

they've alleged that. Now, whether that's true...

MR. WEBSTER: What is beautiful about plaintiffs' complaint is they cited it, where they got those quotes from, and they are specific, handpicked quotes from Clarion-Ledger articles and they -- and I -- if you look at footnote 45 of their complaint, if you look at footnote 23 of their complaint, and you look at what the official said, the officials always said the water is safe to drink subject to certain precautions. The city gave warnings.

Since January of 2016, the city has said if you're going to drink the water, here are five things you need to know: Run your cold tap for one to two minutes before drinking the water; do not use hot water for cooking or drinking; pregnant women and small children should refrain from using tap water; three, to refrain from mixing baby formula with tap water; and, four, to screen small children for lead.

That's in the notices. That's in the statements from Mr. Miller to Kishia Powell to the mayoral defendants in this case. And so the question -- I mean, so let's be clear about this. We're talking about this in the constitutional sense. We're not talking about it in the negligence sense. We're not talking about it in the statutory sense. We're talking about this in the constitutional sense.

In the constitutional sense, the due process clause is to stop state actors from intentionally doing things to people, and there is no allegation of intentionality here. Unless I'm wrong, but there is no allegation that any city official said here are my three options; let me pick the one that hurts the citizens of Jackson the most. There's no allegation of that.

So the question becomes what did the -- of the allegations the plaintiffs allege in the complaint, what did they do to take informed consent away from the citizens of Jackson? What did they do to say we're not giving you a choice on whether you drink this contaminated water or not? We're going to tell you it's not contaminated, even though it is.

There is no allegation of a lie in the complaint. The complaint is City of Jackson officials said certain things, and they could have said it better or they could have said it differently. And the due process clause does not allow that type of second-guessing of government officials in any circumstance. That's not the point of the due process clause.

In fact, the Supreme Court has been clear, the due process clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety or security. It forbids the state itself from

depriving individuals of life, liberty, and property without due process, but its language cannot be extended to impose an affirmative obligation on the state to ensure that those injured do not --

THE REPORTER: Slow down for me, please.

MR. WEBSTER: Excuse me -- do not come through harm through other means.

So, again, the provision of the water -- and I believe plaintiffs are saying this, it's not the provision of the water that gives rise to their claims. It's that we -- they argue that we somehow did something to make -- to force people to drink the water and --

THE COURT: Well, let me ask this question, and it may be, you know, a very easy answer, and then I have a couple more following that.

Is it the city's position that it has no obligation to provide clean water?

MR. WEBSTER: It is not -- oh, that is -- no, that is not the city's position. There are statutory obligations. There are state law obligations. There are tort law obligations. There's not a constitutional obligation.

And, Judge, that may sound very, very harsh, but this is what the United States government has told the world. In 2008, the United States government, in response

to a request from the United Nations, said that the United States Constitution does not guarantee a right to safe water or sanitation. Although, various other laws do.

THE COURT: Okay.

MR. WEBSTER: And what -- and the only argument the City of Jackson is making is there may be other avenues. And if those avenues were in front of us right now, we may be here on a motion to dismiss; we may not be here at all; we may be in discovery. But there is no constitutional avenue.

THE COURT: What is the city's position on whether or not it at least has an obligation not to poison the water or allow toxic stuff --

MR. WEBSTER: The city cannot intentionally poison or contaminate the water, yes. The city, it is -- it would be a constitutional violation for the city to take an affirmative action to intentionally hurt its citizens, yes, but that's not alleged in this case.

THE COURT: Okay.

MR. WEBSTER: Giving plaintiffs' complaint the best reading, that's not alleged.

THE COURT: Okay. The warning piece is alleged, I think, --

MR. WEBSTER: Certainly.

THE COURT: -- so if the city knows that the water

is dangerous, do they have an obligation to warn the citizens?

MR. WEBSTER: And the city -- my position here is that when you look at the -- and the pleading standards in the Fifth Circuit are clear. If the plaintiffs attach some article to their complaint, and the complaint says one thing and the articles say something else, you have to look to the articles.

And the articles and other exhibits that the plaintiffs attached, which are cited in our brief throughout, say the city official said the water was safe to drink, but you need to take precautions in light of what's going on with the water system. And they're in notices that went out to water users. They're in notices that we, as water users, still get today I believe.

If you go on the City of Jackson website now, I think you'll find those notices that talk about how to use the water, running it for one or two minutes, not using hot water for cooking, and telling the various -- the same people who plaintiffs have filed a lawsuit here on behalf of, telling pregnant women and small children to refrain from using the tap water.

THE COURT: What about the boil water notices that come out with the water bill, or not just with the water bill, we hear boil water notices all the time.

MR. WEBSTER: Judge, if you give me one second, there's no media here. There's more than -- so I can say this freely, there's more than one problem with the city's water that people -- that people have -- oh, let's see. God, I'm trying to think of the right way to say this in a legal sense.

The boil water notices are not being put in place to address the lead issues. There are other issues with turbidity and water-pressure issues that require the water be boiled. There's no allegation anyone at the city has ever said boil the water because of lead, period.

THE COURT: But does anybody in the city know if you boil the water, it exacerbates the lead in it?

MR. WEBSTER: I heard -- plaintiffs have alleged that, but that is not factually proved for one. And, Judge, let me be clear because -- because the City of Jackson is not being alleged to have issued these notices, I'm not in a position to talk very intelligently about it. I do know that in working on this case, that when these boil water notices go out, they're to address issues separate and apart from lead, and the professionals and the agencies who are making these recommendations are considering all of the compelling different issues.

THE COURT: So it's the city which issues boil water notices? The city does not issue boil water notices?

MR. WEBSTER: I do not believe the plaintiff has alleged that the city has issued boil water notices.

THE COURT: Okay. So that issue they tied to the state defendants only then? I mean, the boil water --

MR. WEBSTER: Yeah, the boil water notices, yes, sir.

THE COURT: All right. Okay.

MR. WEBSTER: I can tell you what issues they say are on the city defendants, and the boil water issue is not one of them.

THE COURT: Okay. Yeah.

MR. WEBSTER: It's the decisions that were made as to the operation of the water system, which, again, that's a separate -- that's not what we're here on, or we shouldn't be here on in a constitutional sense.

What we're here on in a constitutional sense is what did the city do to force people to drink the water? And provision of the water does not get you there, and it doesn't get you there for a number of reasons. Number one, courts in the Sixth Circuit, in the Second Circuit, and I think in the First Circuit have all said there's no right to water or to clean water. The United States government has said it.

THE COURT: The Fifth Circuit has said it? Because I heard you say First, Second, Sixth, so...

MR. WEBSTER: Every court that we're aware of in the United States government has said it.

THE COURT: Except for the Fifth Circuit?

MR. WEBSTER: I don't know what --

THE COURT: Has the Fifth Circuit said it?

MR. WEBSTER: I don't believe the Fifth Circuit has said it. This is an issue of --

THE COURT: Well, they may say something different.

MR. WEBSTER: They might say something different. But I will say this, the Fifth Circuit has said that there is no right to a contamination-free environment. They've been clear about that.

Okay. So the issue comes down to did the city -- and, I mean, let's just -- I'm going to be as colloquial as possible about it, but did the city lie to the citizens of Jackson? And there's no allegation in the complaint that they did. The allegation is the city officials said things, and they could have said it better or they could have said it differently. And those are not the type of questions that the due process clause or Section 1983 or substantive due process jurisprudence allows courts to answer, and there's a reason. I mean, we can get into the policy reasons for that.

Government should not be lying to citizens knowing it's going to expose them to an injury, and that's not what

happened. So, I mean, I -- I have no position on that but they shouldn't, but that's not what happened here.

There's no allegation of a lie. Even when you look at the complaint, there are several points where the plaintiffs say even though what Ms. Powell or Mr. Miller said was technically true, it was misleading because. And the Second Circuit has really dealt with this issue in the context of the 9/11 cases where there were public statements made reassuring the public about the condition of the air that people were breathing post 9/11. And the court said absent an intent to injure, there's no constitutional or substantive due process violation coming from a public official offering assurances of environmental safety that turn out to be substantially exaggerated; and that's the case we found that was most on point.

And, Judge, I'm not going to plow over old ground that has not been raised generally, so with that, I will conclude my argument unless the Court has more or different questions.

THE COURT: There are a lot of different briefs. Do you join in, or did you raise the discretionary function?

MR. WEBSTER: We did not.

THE COURT: You did not. Okay. All right. Thank you, Mr. Webster. I appreciate you.

Let's take Mr. Stern and then the individual

defendants.

MR. STERN: I'll be very brief, Your Honor, or I'll try to be. Thank you again.

First, I want to point to the Court a case called *Greenwood Leflore Hospital versus Watson*; it's at 324 So. 3d 766, and it actually stands for the proposition that if a notice is deficient on its face or for timing, that you don't need to refile the notice. You can actually do -- this has to do with the state Tort Claims Act. And so this entire sort of back and forth with everybody and the court about reserving the notice and then waiting 90 days, the case on point says you don't have to do that. You can dismiss without prejudice the claims and simply refile, so if the defendants are going to --

THE COURT: But that will include a dismissal without prejudice being without consequence.

MR. STERN: I don't know, and I understand what one of the lawyers -- I believe it was the lawyer that just spoke or maybe Mr. --

THE COURT: It was Mr. Webster, because I asked him specifically.

MR. STERN: So the notice was sent, and then the complaint was filed. Because the claims in the complaint will be dismissed without prejudice and there's no need to resend the notice, and then the complaint will simply be

refiled, all it really does is start the clock. Whether that means there's no consequence to the however many children they say are over 21. I also don't think it's 21, I think it's 22, because it's one year plus the age of majority. And so we're talking in sort of amorphous details about what is probably a handful, potentially, of the plaintiffs out of what was a thousand notices, so that issue doesn't necessarily need to be decided right now.

I'm simply stating for the Court's knowledge, for your staff's knowledge, and for the defendant's knowledge that there's no requirement. In fact, it's not required that plaintiffs resend their notice of claim. And to the extent the city hasn't challenged the sufficiency of the notice in the same way that Mr. Mitchell has, I think it's just a different conversation, so I just wanted to put the Court on notice of that. I haven't read the case in full, but I was informed by local counsel that it's on point. It's good law, and I think it's a deeper dive. Again, that's Greenwood --

THE COURT: Has the statute of limitations tolled on the filing of the original complaint? I mean, I'm trying to think of all these technical issues that we're going to face --

MR. STERN: So I --

THE COURT: -- because we're going to file

everything that we possibly can file.

MR. STERN: As I often say, I don't know.

THE COURT: All right. Okay.

MR. STERN: But to the more, you know, from my perspective, substantive issue about the city defendants, and I'll try not to address all of them specifically. But it's going to be hard not to.

I'm so sorry, can you --

MR. WEBSTER: Webster.

THE COURT: Webster.

MR. STERN: I knew his first name was Clarence.

You know, Mr. Webster just often and early repeated the phrase about intent, intent to harm, there was no intent to harm. There was no intentional conduct. The deliberate indifference standard, as opposed to an intent to do harm, is sensibly employed only when actual deliberation was practical; that's the *City of Sacramento versus Lewis*, 523 U.S. 833, that's a 1998 case.

This intent to do harm is not the standard in the Fifth Circuit, no matter how many other circuits opposing counsel wants to cite. See *Garza versus the City of Donna*, that's 922 F.3d 626, it's a 2019 case. In this line of cases, which includes en banc decisions 20 years apart, none requires proof of officials subjectively intending the harm that occurs.

The case law of the other circuits adheres to *Farmer* and hence doesn't require a showing of subjective intent either, and that's in *The Estate of Gray versus Dalton*, and that's 1:15-CV-061-SADS; that's from the Northern District of the Mississippi. In situations where the implicated agents are afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action -- and this is important. Everything I hope I say is important, but this is specifically important.

In situations where the implicated agents, meaning the city officials and the state officials, are afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action, their actions will be deemed conscious-shocking if they were taken with deliberate indifference toward the plaintiff's federally protected rights.

Deliberate indifference is met where defendants were aware of facts from which the inference could be drawn, that their actions created a substantial risk of danger.

I'd like to now just go over the facts as they're alleged against these city defendants in the complaint, because they meet that standard. They meet it clearly.

As was the case with Mr. Craig, we know, at least according to the allegations in the complaint, that city officials were aware in 2011 and certainly by 2013 that

Jackson was very seriously at risk of a major lead problem. We know that because then, the then Mayor L Senior, along with his Department Head Bell, they actually created a plan to try and fix the problem, and they -- they created that plan out of an awareness that the problem existed in the first place. And that plan included modifying a lime feed that was being clogged because soda ash and lime ash was being used in the water plant as opposed to a liquid lime.

All that's laid out in the complaint, but they absolutely knew; the City of Jackson absolutely knew by 2013, if not two years sooner, that this was a major, major problem, because they took steps and in fact budgeted hundreds of thousands of dollars, as alleged in the complaint, to fix the problem.

And then unfortunately, sadly, the mayor passed away, and his vice mayor, Tony Yarber, who was also on the council at the time, in a very quick, two-month election managed to get elected to become mayor. And he ousted Mr. Bell from the position that he had in favor of Ms. Powell -- in favor of Ms. Powell, and so suddenly you have a new mayor and a new director of utilities. It went from Senior Lumumba to Yarber, and it went from Bell to Powell. And what did they do? What does the complaint alleged they did? They removed the funding to do the fix. They knew there was a problem, and they removed the funding

to do the fix.

THE COURT: And you're saying that the city is -- I mean, because I know these -- I don't want to mix the two, because there are separate defenses as to each of the individual actors I think.

MR. STERN: Sure.

THE COURT: Are you saying that the city is liable because they did those things?

MR. STERN: Absolutely. The city is on the hook for the acts of its employees.

THE COURT: And have you sufficiently -- have you raised a *Monell* claim?

MR. STERN: We have, and they haven't actually made any claims against the *Monell* claim. They didn't move against the *Monell* claim. We -- we addressed it in our brief out of an abundance of caution. But the city never moved to dismiss this lawsuit based on a failure to properly plead *Monell*, and I don't think they can now.

THE COURT: I mean, if they do, what would be your response? You just amend your complaint to add it or say it's already there?

MR. STERN: It's certainly already there. These were policy decisions that we've alleged that would bind the city, and I think because of the way we've alleged it is the reason why they didn't move against them. I don't

think there are substantive issues to dismiss this case that are centered on Monell. I mean, I could be wrong, and if I am, I stand corrected. But nowhere in the motions that were filed by any of the city defendants, and in particular by the City of Jackson, was there a --

THE COURT: A claim that Monell was not satisfied.

MR. STERN: That Monell was not satisfied, that's correct.

So just to go through these facts, and if the Court will accept that the intent to do harm is not the standard, but rather deliberate indifference, efforts regarding the lead poisoning that Bell and Mayor Senior had undertaken, they simply stopped. Yarber got rid of Bell in -- in favor of Powell. Yarber and Powell were aware of Bell's warnings. They were aware of the report; they were aware of this proposal; they were aware of the cost to repair.

First bad decision, Yarber deliberately -- and this is what the complaint says. Yarber deliberately withdrew the funding for repairs. Bell had previously advised the city they had to be very, very careful about taking action that would shock the water system. He said this without any information whatsoever, and in the face of the information they had that the system needed to be fixed.

Second bad decision, the city switched 16,000 connections from the Maddox Road well system, which was

reasonably good water, to surface water which had high rates of corrosivity and which passed through defunct corrosive-control equipment. That was a decision that they made. Instead of fixing the problem as outlined by Mayor Senior and by Bell, they took affirmative steps to do something that was much easier and cost much less money.

This decision was made and implemented without any warning to the residents. Nobody said anything to the residents despite knowing, despite city employees knowing earlier on that the water was bad; that there was no corrosion control; that Jackson was going to be a hotbed for lead poisoning. They didn't warn the citizens whatsoever that they were making a switch to a more corrosive water system. They didn't do any testing on the new water system to determine corrosivity. They didn't --

THE COURT: So if that's true, do you believe that that rises to a constitutional violation?

MR. STERN: I think the combination of all of the conduct that I'm about to describe does, because it's not specific instances. It's taken as a whole, so if I could go even further with what these individuals did?

THE COURT: Okay.

MR. STERN: Almost immediately lead levels jumped when the switch was made to about 15 parts per billion, which is actionable under the safe water drinking act

(sic). Lead levels were likely much higher, because the testing was done in a poor manner.

Jackson continued to make missteps, and this is all before January of 2016. They didn't notify homeowners in 2015 of increased lead levels in June of 2015. They just stayed silent about it for seven months. They didn't do a single thing between learning about the high lead levels, or for seven months to even try to mitigate slightly or to control the lead levels now being reported.

The city was required to send notices of exceedances to the -- to the Mississippi State Department of Health; they didn't. And so the city -- you asked earlier who does the testing, very earlier on you were talking to Mr. Mitchell, and if I could just step back for a minute.

The Environmental Protection Agency is the entity that oversees federal regulations about how water should be treated. Oftentimes, if not always, the EPA grants what's called "primacy" to states to monitor and control their own compliance with federal regulations and sometimes state regulations. In Mississippi, that's what happened. The EPA granted primacy to the Mississippi Department of Health, and then by state statute, the Mississippi Department of Health is able to designate an employee to take on that responsibility, which the Mississippi State Department of Health did with regard to Mr. Craig.

The city is initially responsible for its own testing and then reporting that testing to the Mississippi State Department of Health. Here, Mississippi -- the City of Jackson, in Mississippi, was testing and realized it had exceedances and never reported those exceedances to the Mississippi State Department of Health in violation of the safe water drinking act (sic).

THE COURT: So I guess assuming -- and I know you've got a long list of things, but assuming for purposes of this, I'll have to assume that what you're saying is true, 12(b)(6), 12(c), whatever type of motion this is. Assuming that that is all true, at the end of the day -- I believe I heard Mr. Webster say at the end of the day, we might have violated some statutory regulation. We might have violated some tort principle. We might have violated something, but none of that rises to the level of a constitutional violation.

What's your response to that? I mean, the constitution does not guarantee someone to have safe drinking water, for example.

MR. STERN: Well, it's a subjective standard first to determine if it's deliberate indifference as opposed to intentional harm. In order to meet that standard, you have to evaluate what the actors knew when they made the decisions they made and what the consequences of those

decisions were.

And if that's not enough, if you look at the complaint at Document 51, the amended complaint paragraphs 244, 245, 238, 247, 257, 85 to 90, 251 to 253, in January of 2016, in contradiction to what they knew to be true, Powell told residents that they did not need to stop drinking water.

Opposing counsel wants you to believe, well, that's not true. Just because plaintiffs say it, that's not true, but that's what the complaint says. Powell stated it was not a widespread issue in the city, and it was confined to individual homes, knowing full well it was a widespread issue. Powell said that the water was safe, knowing full well the water was not safe. Powell essentially encouraged residents to drink the water knowing the testing of the lead exceeded federal guidelines. Powell blamed internal plumbing of the homes, knowing full well that the testing was showing it wasn't specific to individual homes.

And Yarber admitted a month later in February of 2016 that 70 percent of the homes in Jackson were built before there was any focus on lead plumbing affirming this was a high-risk situation. Yarber's concern was public perception rather than public safety. If you look at the amended complaint at paragraphs 248 and 251 to 253, Yarber stated -- he stated out loud he preferred not to discuss

this despite knowing full well the gravity of the health effects.

Despite the urging of city council, he refused to issue a declaration of a civil emergency, which would have required expanded testing and would have triggered federal resources. He opposed the resolution denying that the system itself was an issue and continuing along this false narrative that this was isolated to individual homes. And he chose to oppose it, and as he said was because he didn't want the citizens of Jackson to believe that this was the next Flint.

By the way, that in and of itself, if you look at the complaint at paragraphs 29, 248, 249, and 251 -- I think what the counsel for defendants thought was going to happen today was I was going to stand up here and pound on my chest and talk about *Guertin* and Flint, and say this was fine. I haven't said any of that. I haven't said any of it. I haven't argued they were on notice because of *Guertin*. I haven't argued they were on notice because of Flint.

But their own words in 2016 show that they, in fact, were. Powell reportedly downplayed the crisis in January and February of 2016, saying this is no Flint. Powell told the public that the crisis was different than Flint, because Flint had no corrosion controls. Powell claimed

falsely that Jackson's lead levels were nowhere near as high as Flint. Yarber said, "We are not Flint."

And so to the extent that any defendant wants to get up here and argue that they weren't on notice because *Guertin* wasn't controlling and because Flint was its own thing, they sure as heck in 2016 were talking about being on notice by trying to distinguish everything that was happening in Jackson from Flint. That's not my words. That's not my argument. I'm not relying on the Sixth Circuit case to convince Your Honor of that. Those are their words as pled in the complaint.

THE COURT: But just because Flint was going on doesn't mean that established the law in this circuit; right?

MR. STERN: It's not that they have to be aware. There's actually a court decision on point. They just simply have to be aware that there's an issue that could lead to a violation of a fundamental right. And knowing that in 2013 and 2011 that Jackson was going to be a hotbed for lead poisoning, knowing that their predecessors in government had made a plan, that was a solid plan, to address that issue; knowing that once those individuals died, they were going to withdraw funding in -- in either an effort to do something cheaper or -- and we haven't gotten into it -- the relationship that Mayor Yarber had

with Trilogy, which in and of itself as pled in the complaint is pretty shady in terms of --

THE COURT: But even here if we assume the Flint case had some sort of notice or some sort of clearly established law that you could rely on, it would not have been clearly established until the date the Sixth Circuit had ruled; right? Not the District Court.

MR. STERN: This isn't about -- you're correct. But the argument here is not and has never been that it was clearly established by *Guertin*.

The argument here has been that the same underlying United States Supreme Court cases that led the *Guertin* court, the Sixth Circuit, to find it was a clearly established right preexisted any of the conduct here.

There's this miscommunication somewhere because one time, potentially on a Zoom call, I mentioned Flint, or because people know that I represented plaintiffs in Flint that somehow the argument is that *Guertin* put Jackson on notice. That is not the argument.

There's not a single case cited by the Sixth Circuit or from the United States Supreme Court in *Guertin* that was not on the books prior to what happened in Jackson happening in Jackson. The same rationale that the Sixth Circuit undertook and relied on to find it was a clearly established right in *Guertin* existed prior to what happened

in Jackson, so we should not be conflating the issues of *Guertin* put Jackson on notice with what the underlying cases in *Guertin* stood for.

THE REPORTER: Slow down, please.

MR. STERN: I'm sorry.

THE COURT: It's okay.

MR. STERN: Moving on, not only did -- did the city actors Yarber and Powell fail to inform and misled through some of their representations that either the water was safe or it was limited to a specific place.

But in 2018, Mr. Miller, he told the public that there's been no detecting of lead and copper in the water supply. At least according to the allegations in the complaint, we know that that's false in 2018.

Then the city makes it worse. If you look at paragraph 289 to 290, 271, 276, 112, 279 to 282, paragraph 32, paragraph 283, they failed to adhere to compliance plans, which required corrosion-control studies. They failed to maintain a constant PH, and low PH leads to high lead levels. And even as late as February of 2022, Jackson continued to fail to meet the requirements of the LCR.

Now, if they didn't know any of the things that happened in '11, in '13, in '16, in '15, maybe it's a different conversation, but we're talking about 11 years later. Eleven years later, they are still deliberately

failing to comply with the regulations of the Lead and Copper Rule.

And then we get into this whole Yarber-Powell-Trilogy political ally. Look at the allegations in paragraphs 124 to 125, 158, 300 to 301, 298, 299, 302, 339, 307, 319 to 323, and 311 to 315. They used Trilogy, their political ally, as an excuse not to declare an emergency. The owner of Trilogy held a campaign event for Yarber, and he's not even an engineer.

THE COURT: Is that -- would that rise to the level -- but with Trilogy, you know, they're not here for all intents and purposes. I mean, what we're talking -- what the city has narrowed in on is, what is the constitutional violation with respect --

MR. STERN: So I think what the city is honing in on is what is the conduct that's required in order to make a finding of a constitutional violation. I don't think the city is arguing at this point there's no right to bodily integrity.

I do think that they're arguing that it wasn't clearly established, and I've already addressed that by pointing you to the underlying cases from the United States Supreme Court that led the *Guertin* court to make its decision. But if we're focusing simply on the conduct, it's telling that counsel stood up and is imploring you to

use an intent to do harm standard when that is not the standard. The standard is deliberate indifference.

And, again, in situations where the implicated agents -- here, these are all the city officials -- are afforded a reasonable opportunity to deliberate various alternatives prior to electing on course of actions, their actions will be deemed conscious-shocking. Thus, their actions will be deemed unconstitutional if they were taken with deliberate indifference towards the plaintiff's federally protected rights.

These allegations, the water is safe, telling people it's safe. Telling people that it's -- it's limited to particular homes. Telling people in 2018 that the testing showed no high lead results, making a decision to not do the project that took two years to create by Bell and Mayor Senior in favor of let's just make the switch without even testing, and then employ our friends at Trilogy, the owner of which isn't even an engineer. Those are absolutely conscious shocking, especially when read in the light most favorable to the plaintiffs.

And then finally when we get to Mayor Junior -- and, again, it's Lumumba. I don't want to mispronounce anyone's name out of respect. But one thing the Court -- I think it may not be clear thus far from the argument. The allegations in the complaint don't start and stop in 2015

and 2016. The allegations start based on what happened in 2015, and they continue for a long period of time.

The allegations against Mayor Lumumba Junior, are not that in 2015, he was deliberately indifferent. He wasn't in a position of city power. Same thing for 2016, same thing for 2017. But if you look at the allegations contained in paragraph 327, 325 to 329, 331 to 334, 332, 341 to 344, in 2020, on March 27th, the Environmental Protection Agency issued an administrative order to the City of Jackson through Mayor Lumumba Junior for violations of the Safe Drinking Water Act. There's no dispute about that. It said the water system presented an imminent and substantial endangerment to the persons served by the system; that's in March of 2020.

He failed to alert the public or the council until April of 2021, a year later. The same mayor who received notice from the Environmental Protection Agency of these violations in March of 2020, literally didn't tell the public or his city council for a year. He knew that the plant was understaffed; that's pled in the complaint.

Once he read the notice, not only did he know there were violations, but that the plant was understaffed, and he failed to do a single thing about it. And in fact, as recently as I think it was late 2021, I watched, and then he went on television and said that there was no issue with

the water. He actually accused me of being, you know, a lawyer --

THE COURT: That was after this lawsuit was filed, though; right?

MR. STERN: I don't know what the timing of it was. It may have been. It may have been.

THE COURT: All right.

MR. STERN: So just to put this all in perspective as to the city, the Mississippi State Department of Health called Jackson high risk in 2011 -- in 2011. In 2013, Public Works Director Bell provided a warning and a plan for repairs and to install corrosion control as soon as 2013.

Eleven years later -- eleven years later, through the actions that I just described and the inactions that I just described and the statements that were made by all of these officials, that never happened. It never happened. That, if that is not deliberate indifference, if that is not conscious-shocking, then I don't know what is.

THE COURT: All right.

MR. WEBSTER: Judge, may I briefly respond?

THE COURT: Yes, absolutely.

MR. WEBSTER: Thank you, Judge. May it please the Court? I don't know Mr. Stern very well, so I'm not going to say that he did this intentionally. But he completely

rewrote his complaint as he stood up here just a few minutes ago. He said the City of Jackson did this testing in the summer of 2015 and didn't tell the state about it until January.

His complaint, paragraph 129, on or about June 23rd and 24th of 2015, officials from the Mississippi Department of Health performed water testing in Jackson required by the Safe Drinking Water Act. He then cited the test results, where he got them from. He then says that all of this relates to the State of Mississippi, not the City of Jackson.

So then we jump over from paragraph 190 to paragraph 221, and he says despite finding seriously high lead, blah, blah, blah, the state officials did not inform the City of Jackson residents and water users at that time. He does not claim that the City of Jackson in this complaint -- now, he may have another complaint coming, but in this complaint, he does not allege the City of Jackson got notice of the lead exceedance until January of 2016.

And on the day the City of Jackson got notice of the lead exceedance, they had a press conference that Kishia Powell was at, and he quoted Kishia Powell as telling folks the water was safe. But his own exhibit showed that that is not all she said. She said that certain precautions had to be taken.

He then mentions that Robert Miller made a mention regarding the condition of the water. He's referring to a press release that he attached to his complaint. On the last page of that complaint is just what I told the Court the city had been telling folks since 2016: Running tap on cold one to two minutes; households should never use hot water for drinking or cooking; residents should clean out their faucet aerator by unscrewing the aerator; any child five years or younger and any pregnant woman should use filtered water or bottled water for drinking and cooking; baby formula should be --

THE REPORTER: Slow down, please.

MR. WEBSTER: I apologize. I'm sorry.

But it is clear that since 2016 -- and plaintiffs don't deny this. Since 2016 when the city was first made aware of a lead exceedance, it has been giving statements that included clear warnings placing the city on notice of -- excuse me -- on notice of precautions that need to be taken when protecting -- when using the water.

Now, he mentions that I try to impose this intentionality requirement in the Fifth Circuit, and I don't have -- number one, I don't have to impose it; I can just cite from the cases, that this was a case discussing the Fifth Circuit case law. Fifth Circuit case law in this area is sparse. The few cases that explore the

constitutional liberty interest in bodily integrity defines this right as the right to be free from intentional injury inflicted by a state actor.

In the Fifth Circuit case in 2015, *Pierce versus Hearne*, it says the foundational question on a bodily integrity claim is whether state actors deliberately abused, restrained, threatened, or touched. Now, what I did say was --

THE COURT: Give me the citation to that. You said Pierce?

MR. WEBSTER: Yeah, this is *Pierce versus Hearne Independent School District*; it is 600 F.App'x 194, page 198, and it's cited in our brief, Judge.

THE COURT: Okay.

MR. WEBSTER: But what I -- what I really said was that plaintiffs don't claim that in any of the actions the City of Jackson took, they intended to harm their citizens. So in the absence of that allegation, the only way that they can make a claim would be tantamount to the claim the Sixth Circuit recognized in Flint, which is coercion or taking away informed consent through a lie. And that's not present here. That's all that I've said about the Flint case. That's all I've said about the standard, and not one word I've said can be contradicted by either the law or what plaintiffs filed in their complaint.

Thank you.

THE COURT: Thank you, Mr. Webster.

MR. STERN: Your Honor, may I just make one comment?

THE COURT: You'll have an opportunity to make yours behind these other defendants being heard.

MR. STERN: That's fine.

MR. HAWKINS: Good afternoon, Your Honor. John Hawkins for Mayor Lumumba and Mr. Miller, Robert Miller, the former public works director.

To put this in context, these two individuals, Mr. Miller was with the city as public works director from I believe October of '17 until July of '20. Mayor Lumumba who -- and I understand why it's tempting to call him "Junior," but it's Mayor Antar Lumumba. He's not a junior, but in any event, he took office in June of 2017.

And so what I would ask the Court to recognize first and foremost is, there's been no lead exceedance action level finding since 2017. The findings for action levels that were exceedances that required some action to be taken were the ones that were being discussed that came out of the 2015 testing and the 2016 testing, so there have been no exceedances since then.

The other thing I would like to point out is that almost all of the conduct complained of by the plaintiffs in this case precedes the dates that Mr. Miller worked for

the city and Mayor Lumumba took office. All of the conduct that he would complain of about Mayor Lumumba and Mr. Miller, while there are very few allegations in the complaint regarding those individuals, all of that took place before *Guertin* was handed down. So we would adopt and agree with the prior arguments dealing with whether or not there was a clearly established constitutional right that would apply to the conduct at issue in this case or that would have placed these officials on clear notice that conduct they engaged in would violate a clearly established constitutional rights.

Even, however, for the sake of discussion, should the Court determine otherwise and follow some of the case law that *Guertin* referenced in its decision, we would still get to the question of whether or not the conduct at issue here by the individuals is so conscious shocking that it rises to the level of deliberate indifference for the purposes of this constitutional analysis.

In the *Guertin* case, citing to Supreme Court precedent and other Sixth Circuit law, it references there's no allegation to defendants -- that defendants intended to harm Flint residents. Accordingly, the question is whether the defendants acted with deliberate indifference in the constitutional sense. That's exactly what we're arguing here. As far as we know, there's no

allegation that any of the city defendants, the City of Jackson, intentionally sought out to harm its residents.

So we're looking at the question of deliberate indifference. And, Judge, Kishia Powell said it: It's not Flint. This is not Flint. This is not even close to what was going on in Flint. And I would submit as passionate as Mr. Stern is -- and I understand, I've been on this side of cases before dealing with children I represented. I don't hold it against him. But the fact is that this case is nothing like Flint, so he doesn't want to talk about Flint. And I submit to the Court there's a reason for that, and that's because of the conduct that was at issue in Flint.

Judge, they made a switch there to a new water source being the Flint River that they knew was harmful. Once they made the switch, and it was determined that there were Legionnaires outbreaks there, they claimed that that Legionnaires' problem was the result of an outbreak at a local hospital and specifically lied about the true nature and the true source of the problem. They lied about that to the other officials, to the citizens up there. There is no allegation even close to that in this case.

When -- when the City of Jackson made the switch to surface water, they did so at a time when the great majority of the citizens of Jackson were already being supplied with safe drinking water from that same source.

This wasn't a brand-new source with known problems.

The plaintiffs allege in their complaint --

THE COURT: I mean, the barometer, though, is not the -- I know we've been talking about the Flint case. The barometer is not going to be the Flint case in this case; right?

You compare two bad situations with each other and say one is worse than the other --

MR. HAWKINS: Judge, if --

THE COURT: Hold on. If you look at what happened in Flint, 16 percent of the households were exposed to it. In Jackson, more than 20 percent, 22 percent, so in that sense, Jackson, if you believe these allegations, might be worse. If you do have elected officials misleading the public about the safety of the water, safe to drink no matter -- safe to drink with all the caveats that Mr. Webster mentioned, what people hear is the water is safe to drink.

MR. HAWKINS: Yes, sir.

THE COURT: So should Flint have set the standard? I realize everybody's been talking about Flint. Flint does not set the standard; right?

MR. HAWKINS: Judge, I would agree. What I'm submitting to the Court is there were certain defendants in Flint that were denied qualified immunity, and I'm trying

to express to the Court why it is they were denied qualified immunity. And the reason is they engaged in, according to the allegations there, in conscious-shocking, deliberate indifferent conduct toward the rights of citizens. We don't have anything close to it here.

If I could just make a few comparisons, I'm not saying that the Court ought to apply Flint. I'm just saying there's a reason they don't want to talk about it, and it's because our city defendants, Mayor Lumumba and Mr. Miller, didn't engage in conscious-shocking behavior, anything akin to what was being dealt with up there in that case.

City Manager Earley in that case, he forced a switch of the water knowing that it was dangerous. He knew that the water was untreated. There was no corrosion-control system in place. They lied to the EPA about whether there was a control -- a corrosion-control system in place up there. They didn't do that here, Your Honor.

When Mr. Bell was talking about different things that might be done with the system and budgetary issues were being discussed and what to do, they were dealing with the corrosion control problems. There was a system in place here. The question was about lime feed or soda ash or whether or not the pumps were working properly or whether it could be afforded, and the attachments to their

complaint and the very allegations in their complaint show the city officials here were dealing with those problems and they were being transparent about it as they did it.

In Flint, Earley lied about this Legionnaires' Disease. Judge, I can't -- I can't overemphasize the importance of this. They knew that that outbreak of a deadly disease was being caused by the Flint River and caused by their switch. Instead of switching back after the public requested it, instead of switching back after the city council up there voted on them to do that, they doubled down, and they kept drawing their water from that. And then lied saying the Legionnaires' Disease outbreak came from the hospital and not the river. There's nothing like that alleged in this case.

Ambrose up there, the emergency manager, he was offered a deal to reconnect back to the safer water. He said no to that. The city council voted on it; he rejected their vote.

Glasgow up there, he knew the plant wasn't ready and decided to do it anyway. He claimed the other officials pressured him to make the switch knowing of the danger. We don't have that here. The allegation we have here is that there weren't sufficient testing done to know for certain just how safe it would be, but we have a water source that's already supplying a great majority of citizens. And

that's acknowledged in their complaint.

They claim in Flint that they were providing corrosion control; it was a lie. We didn't lie about that here. We had problems with the corrosion control --

THE COURT: What about the allegation in the complaint, amended complaint, one of the complaints in paragraph 265 somewhere that Mr. Miller says -- and I know you had indicated almost all of the stuff -- I did hear you say almost all of the allegations were pre Antar Lumumba and Miller. You said "almost all," so that suggested there might have been some.

But in paragraph 265 of the amended complaint, Miller gave a press conference saying there's been no detecting of lead or copper in the water supply.

Now, I realize there might be something else that he might have said that would be questioned about what did you mean when you said that? Were you looking back to the time in which you've been here, or were you thinking back in 2015. But if on its face there, that would not be a true statement; right? That there's been no detecting of lead or copper in the water supply, a statement attributed, according to the amended complaint, July 2018.

MR. HAWKINS: Yes, Your Honor, that was in July of 2018 in response to issues that had come up. And the city was telling -- the city officials, including Mr. Miller and

Mayor Lumumba, were telling the citizens the problems with the system, and in that commentary, they explained that the city's drinking water does not test positive for lead. That was true. There were no lead exceedances at that time.

THE COURT: But I'm just looking at on its face, what that clause says. I think you might be able to extrapolate and prove that point with discovery, right, that this is what they mean. This is what that sentence means -- this is what it means.

He was standing up at a press conference, the question was asked to him, and he was specifically talking about, well, had we just tested the water a week ago? No, it tested, and there was no detection of lead or copper.

I don't know how it is. But, again, Rule 12 tells me that I need to sort of look at all these allegations and presume they're true.

MR. HAWKINS: That's true, Your Honor, and I concede that.

THE COURT: Okay.

MR. HAWKINS: What I would ask, though, is for the Court to also recognize that the attachments to their complaint, including this press release, also has to be read in full and -- and the conduct that's being alleged here with a blanket statement -- there's no lead in the

water system -- leaves out a lot of other proof, or allegations if you will, that are incorporated into the plaintiff's complaint by virtue of this attached exhibit, it's important to look at the specifics of this.

THE COURT: Okay.

MR. HAWKINS: And in this Public Works Director Robert Miller says the City of Jackson was notified in July of 2018 the city failed to consistently maintain the minimum PH of 9.0 for drinking water from the O.B. Curtis Water Treatment Plant, which is a violation of the city's optimized corrosion-control plan during the months of January 2018 to June of 2018.

He says the city also failed to consistently maintain a PH of 8.6 in the monthly water distribution system monthly samples. He goes on to clarify, when I say we failed to meet it consistently, we met the target regularly, but there were occasions of hours where the PH was below the level.

What he's doing there, Judge, is -- is -- I mean, he's an expert, right, on these issues. He's trying to explain what's going on to the public. He's not misleading anyone. He is saying the truth about what the city is dealing with. He goes on to say, we anticipate we may need to replace the equipment. Meanwhile, we've implemented temporary chemical feed equipment that's having a better,

but not complete, success.

I would submit to Your Honor what this is, along with what Mayor Lumumba says when he says we're dealing with these issues. He's the mayor, he doesn't know it on this detailed level, but he's saying we're trying to deal with these issues, too. They're coming out and telling the public about it. This is transparency. This is not concealment. This is not what was happening up in Flint, Michigan. This is -- this is a city trying to work through their business issues. This does not rise to the level of conscious-shocking, deliberate indifference to the citizens' rights. It just doesn't.

THE COURT: And that's what the Court would have to find to get over the burden of qualified immunity with respect to your clients?

MR. HAWKINS: Yes, sir.

THE COURT: Okay.

MR. HAWKINS: There was another -- there was another -- I would like to give the Court an example of another notice that came out. Well, let me leave it at this: When the notices were provided, the City of Jackson, when they made statements to the public, they made statements that were truthful, and they were dealing with the problem. And I would submit it's transparency, it's not concealment.

They -- they had a notice come out in late April, the 27th, from director of -- or the enforcement and compliance assurance division of the EPA, and that was April 27th of '21. Now, Judge, at that time, the EPA reminded the city that back in 2015 and 2016, you exceeded the action levels, and, again, I would submit that there's no allegation or proof to the contrary, there's been no exceedance of the lead action level since then.

That's not to say there haven't been other issues with the water. I want to be careful I'm not -- I'm not being crafty there with the Court. I'm saying there were no lead issues, and this is a lead case.

So this notice comes out and says, you know, you had some problems with the action levels back then. It says the city conducted an optimal corrosion-control study, which the city did, relied on engineers as we know in this case. The engineers provided a recommended treatment. The city provided that to the Mississippi State Department of Health. MSDH concurred with the recommended treatment and provided a deadline to do some things. And it is true the city was not in full compliance with all of the technical requirements of the plan to be implemented, but what's also true is they were working the problem. And they were doing so at a time when they didn't have -- they didn't have the ability to fix this problem overnight, and there are

arguments about it taking too long. But these are not actions that rise to the level of deliberate indifference.

They come out with a statement to the city several days later, May 12, '21, so not -- about two weeks after they'd gotten this notice, in which they say we routinely sample the water. In 2015, these tests showed lead levels that were excessive. It goes on to say during certain monitoring periods -- '18, '19, '20, '21 -- we failed to meet treatment technique requirements.

Again, that's true, and that's transparency. That's the city letting its citizens know what's going on. They say what should I do, or what should the citizens do? They explain to them again, here are the precautions you need to take, because when the city told its citizens about issues that came up, they told them time and again here are the precautions you need to take.

What does this mean? Well, typically, they talk about what's going on with the leaching potential problem. They talk about the system, what's being done, we're inspecting it, we're working on it. This is a city, I would submit, being truthful with its citizens. This is not conscious-shocking deliberate indifferent behavior.

The allegations are very few as to Mayor Lumumba. It says that he had a press release in 2018; we've talked about that. It says that at some point in later years when

there were not lead exceedances at issue, that the mayor didn't budget for enough people to be working at the plant. That's an allegation, but there's no proof or really any allegation that that had a direct impact on lead levels. Or more to the point, that the mayor somehow would have known he was likely harming his citizens and misleading, purposefully misleading citizens, and taking actions, as Mr. Stern would say, to give them the sword.

That's not what these city officials were doing, and I submit that they're entitled to qualified immunity, Your Honor.

THE COURT: All right. Thank you, Mr. Hawkins.

Mr. Harris, I think you represent the last of the individual defendants.

MR. HARRIS: Yes, Your Honor. May it please the Court? Terris Harris on behalf of former mayor Tony Yarber, Kishia Powell, and Jarriot Smash.

And, Your Honor, I won't go over everything and rehash all the things that have been argued before you today. First, I would start with Mr. Smash. The complaint is absolutely void of any allegations of what he did, and based on that alone, the 12(b)(6) should be granted for him without going into all the other arguments. But I will incorporate by reference all of the city arguments.

Now, as it relates to Mayor Yarber and Ms. Powell,

again, I won't -- I do not agree that there has been a constitutional violation, and I would adopt the city's argument. But let's assume for a moment that the Court finds that there was a constitutional violation, then still with that, my individual defendants are still entitled to qualified immunity.

As the Court knows in the qualified immunity analysis, one of the prongs the Court has to look to determine whether or not the right at issue was clearly established at the time of the defendants' alleged misconduct, and to be clearly established, the Court looks to a couple of things. As the learned judge wrote in *Jamison versus McClendon*, for a law to be clearly established, it must have been beyond debate when the defendant broke the law.

Additionally, a public official like my client cannot be held liable unless every reasonable public official would understand that what he or she was doing would violate the law.

Furthermore, as this Court has held and the Fifth Circuit has consistently held, it does not matter that we are morally outraged or the fact that our collective conscious is shocked by the alleged conduct, because it does not mean necessarily that the official should have realized that the conduct violated a constitutional right.

That's very important, Your Honor, because at this stage, qualified immunity, the plaintiff has to bring forth controlling authority that there was some constitutional violation. If there's no controlling authority, the plaintiff has to bring forth a concessive or persuasive authority that defines what the right is to a high degree of particularity.

Said differently, Judge, they're supposed to bring forth clearly established law that is particularized to the facts of this case. To make it all the way simple, for qualified immunity for my clients, here are the questions, Your Honor. Whether or not the cutting of a budget or the reallocating of funds in the budget to address other competing governmental interests has violated a constitutional right. There have been no cases where they're controlling or persuasive to establish that to the point where it's clearly established.

Additionally, they would have to have brought forth some authority to say that when these public officials carry out things that was done and planned in a previous administration and switch a source for water from a well water to a surface water violated a constitutional right. We don't have that here, Your Honor.

Additionally -- which they tried to make a lot of references back and forth with what happened in Michigan

with the statements that were made. So now the next question is whether or not there's any authority where they can show that it's clearly established that a public official who makes statements, and statements with qualifiers, they may tend to be misinterpreted by a citizen, violated the constitution. I submit, Your Honor, that there are not.

In the simplest form, that ends the qualified immunity analysis, because they cannot show that that occurred. And what we have here, Your Honor, we have the plaintiff arguing that all of these constitutional issue, they are basically couched in terms of what we know really is a tort claim. And we have raised in our briefing that under the Mississippi Tort Claims Act, obviously as Mr. Webster stated is not timely, but even going beyond that assuming that they were timely for my clients. My clients still should be dismissed, because under the Mississippi Tort Claims Act, they were sued in their individual capacities. The Tort Claims Act says you can't do that.

Now, interestingly as well, Your Honor, you asked Mr. Stern about the individuals, and he said to the Court that the city is responsible for the individual defendants, because they were employed in the course and scope. Well, if that's the case, obviously in the course and scope of

the Mississippi Tort Claims Act, they're out.

But what's interesting about that, Judge, is this Court still -- even though that when the Court finds and should find that there's no constitutional violation, where there was no constitutional right that was violated, the Court can still dismiss the individual defendants and the City of Jackson because there no was constitutional violation. But then when we get to the *Monell*, which it's not my client, but if they say my clients did something, there's no respondeat superior under *Monell*, anyway.

So he made some allegations and tried to intimate that Mr. Yarber had done something inappropriate by hiring Trilogy, because Trilogy's owner was not a professional engineer. That misses the point in that while the owner of Trilogy is not a professional engineer, Mr. Yarber knew obviously that there was a professional engineer who was conducting the study for Trilogy.

Interestingly, Judge, who they relied on, Mr. Bell who's supposed to be the whistleblower, he himself is not a professional engineer. Yet Kishia Powell is, and Kishia Powell made the statements that she made with the qualifiers, because she is a professional engineer. And Kishia Powell as a professional engineer knows that she should retain a professional engineer to do the corrosive study. So, Judge --

THE COURT: Is there a whistleblower allegation in this complaint?

MR. HARRIS: Well, it's not, Your Honor. They've tossed that word around to make it sexy for the media. One would assume that Mr. Bell was fired because he told them that something was wrong.

THE COURT: But that's not in this complaint anywhere, is it?

MR. HARRIS: While he's referred to as a whistleblower, there are no allegations that he was terminated because he was -- there's no -- there's no cause of action for that. There's some allegations that he was terminated because he blew the whistle.

Well, Your Honor, that's all I have, because that qualified immunity analysis as articulated and as the Court eloquently laid out in *Jamison versus McClendon*, as harsh as it is, qualified immunity, at this point Mr. Yarber, Mr. Smash, and Ms. Powell should be dismissed from this action. And I'll answer any question the Court may have of me.

THE COURT: That's all.

MR. HARRIS: Thank you, Your Honor.

THE COURT: Thank you.

Mr. Stern, you can make your point that you wanted to make.

MR. STERN: Just I thank you, Your Honor, again for the opportunity to be here today. I just want to go back to this issue about intent versus deliberate indifference, because this standard is being misstated significantly before Your Honor.

The deliberate indifference standard as opposed to an intent to harm is sensibly employed when actual deliberation is practical. If Your Honor finds that practical deliberation was -- was warranted here based on the fact that these individuals knew as early as 2011 and 2013 that the water in Jackson could lead to lead poisoning, then it shifts from this intentional-type conduct to a deliberate indifference standard. I'm just saying that one more time so that Your Honor -- so that I can be on record as articulating this standard as the Fifth Circuit has in *Garza versus City of Donna*.

We've heard in the last several --

THE COURT: Let me ask you this question --

MR. STERN: Sure.

THE COURT: -- from my notes. Are there any allegations against Mr. Smash?

MR. STERN: Yes.

THE COURT: In the complaint?

MR. STERN: Yes.

THE COURT: Okay. Where?

MR. STERN: They are on page -- at paragraph 402, A through N.

THE COURT: Okay. Thank you.

MR. STERN: I don't need to read them to you, but it --

THE COURT: You don't need to read them to me. If that's where you say they are, I'll find them.

MR. STERN: There's also a distortion of what the allegations are that lead to deliberate indifference as to these city employees. Here's what the complaint says.

The Jackson defendants -- this is paragraph 244. The Jackson defendants, most prominently Yarber, Powell, and official statements made on behalf of Jackson made false statements. This is the complaint, these are the allegations either explicitly asserting or otherwise implying that Jackson's water was safe to drink, when in fact it was not.

Even though she acknowledged -- paragraph 245 -- there were issues with lead in Jackson's drinking water, Powell nevertheless stated to the Jackson Free Press, "This is not a situation where you have to stop drinking the water."

Mr. Harris just explained that Ms. Powell was an engineer. This isn't just some elected city official who, you know, she's got a desire to serve her community, and

for whatever reason has decided to run for city council. This is an engineer who knows as early as 2011 but certainly by 2013 that lead is a problem, telling a free press "This is not a situation where you have to stop drinking the water." All of the allegations contain --

THE COURT: So to the extent you cited a Free Press article, a portion of it, the Court is obliged to look at the --

MR. STERN: A hundred percent, but you also need to look at it in the light most favorable to the plaintiff as if it was alleged in the complaint.

These -- these -- everybody here has been very kind. I respect significantly the bar in Mississippi. I appreciate y'all having me. I don't know how to respond when it comes to Flint, because on the one hand, one of the lawyers stood up and said there's a reason Mr. Stern doesn't want to talk about it. And then, respectfully, he completely distorted the facts of the Flint litigation.

If anybody in here knows, I just tried a case for seven months in Ann Arbor, seven months away from my family. In seven months, we've called 45 witnesses in the Flint litigation, and it ended in a mistrial. It ended in a hung jury. I know those facts better than anybody. If I thought it would be helpful to come here today and explain to you how the facts in Flint mirrored the facts here and

that somehow that was persuasive, I would have done it.

In the same vein, by trying to distinguish the facts here from Flint, it makes no sense, because Flint happened around the same time this did. The only import of the Flint litigation and the only import of *Guertin*, Your Honor, are the underlying cases cited by the Sixth Circuit relying on Supreme Court precedence to make a determination that there was a violation of bodily integrity.

And in terms of the whistleblower, Mr. Bell, there's no allegations of whistle blowing. There's no *Qui Tam* case in -- in this complaint before the Court. But there was an allegation that he was fired because he was a whistleblower in the sense that he was going to and starting to say things that those in power didn't want him to say; that's where the word "whistleblower" comes in.

It wasn't, as Mr. Harris said, to make the complaint sexy. Just like not talking about Flint wasn't because I'm scared of distinguish the facts, which were actually misstated significantly by counsel, and that's no one's fault. You know, unless you've lived it, it's hard to talk about.

So we submit to the Court, Your Honor, there's a clearly established right to bodily integrity under Supreme Court precedence, let alone the Fifth Circuit. It was clearly established at the time.

The conduct that's alleged in the complaint, not because someone made a decision to do this or made a decision to do that, but the lies, the misleading, the informing people that the water is safe knowing full well that it's not safe, requiring testing within your department that you know is going to yield false results for the purpose -- for the purpose of making sure that people don't know how bad the water is. Those are all conscious-shocking under a deliberate indifference standard.

And it's a deliberate indifference standard, not an intentional standard, because there was significant time for every state actor involved in this case, and as pled in the complaint, to deliberate their own conduct, their own words, and how they went forward.

Thank you, Your Honor.

THE COURT: All right.

MR. HAWKINS: Your Honor, could I bring just the citations of the Flint cases to the Court's attention, so that the Court can read those?

MR. STERN: If we're going to do that, I would ask to submit -- there's about 14,000 complaints --

THE COURT: He was arguing -- his argument suggested that there were some things that are different about the cases, so he's entitled to tell me that support.

MR. HAWKINS: I'm just concerned counsel said I've completely misrepresented them, so I wanted the Court to have the cites. *In Re Flint Water, Waid versus Earley*, 960 F.3d 303, 2020, and *Guertin versus State*, 912 F.3d 907.

THE COURT: Okay. Thank you, Mr. Hawkins.

MR. HARRIS: Your Honor, very briefly I just want to point out for the Court as it relates to Jarriot Smash, the plaintiffs' complaint, their statement of facts runs from paragraph 76 through 396. I've read that complaint over and over. I may have overlooked it, but Jarriot Smash is not mentioned once in their statement of facts.

Counsel stood here and he said, yeah, he's mentioned in paragraph 402. Paragraph 402 is under the negligence count, that's Count 3 of their complaint. There are no factual allegations whatsoever as it relates to Mr. Smash, so under *Twombly* and its progeny, 12(b)(6) is most appropriate for Mr. Smash.

Thank you.

THE COURT: I see you looking, Mr. Stern, because you did mention 400 --

MR. STERN: No, 402 --

THE COURT: 402? Speak into the microphone.

MR. STERN: Your Honor is permitted at this stage to read the allegations, wherever they are in the complaint, to apply however Your Honor sees fit in the light most

favorable to the plaintiffs, so the allegations contained in paragraph 402 are applicable to -- to Mr. Smash.

If Your Honor finds that they're not, or there's some prerequisite that a statement of facts needs to address what's alleged -- there are certain complaints that get filed with no statement of facts. All the facts are included in the claims, and so there are --

THE COURT: We need to know what facts apply to which party, though; right?

MR. STERN: We would stand on paragraph 402 as to Defendant Smash.

THE COURT: I would say thank you ladies and gentlemen, but the only lady at the table did not participate in the argument. So thank you, gentlemen. I appreciate all the work you all have done to this point.

Obviously after the Court rules, if there are any claims -- well, we know one party is in this lawsuit, because they have not tried to withdraw themselves from the lawsuit; that's Trilogy at least.

Once we figure out where we go from this point, obviously the next phase of the process, if there are claims remaining against any of the individual defendants, then those parties would likely be directed to the magistrate judge to get a case management order in place.

Assuming there's some issue with these notices and

whether people are going to have to refile or reserve and then refile, obviously for the benefit of the plaintiffs, if you're required to do that, you refile your complaint, and you just need to make sure the civil cover sheet suggests there's a related case. Otherwise, it might get assigned to somebody else, and the Court will have to go through the process of getting it back here.

There's going to be one judge on this case. It might not be me, but it's going to be one judge -- well, I ain't going anywhere; it's going to be me. Let me not put that out there. Judge Reeves going somewhere; no, he ain't.

So, again, I appreciate all the care and attention that you've all put into this case, and as I tell every party in every case: It's in your hands to deal with. It could be resolved at any time on your terms, and the parties should always be talking about how do we get to some resolution that everyone can live with.

I don't expect that to happen real soon, but please know and please understand that I tell people that in every case at every phase, whether you're dealing with a motion to dismiss, some other discovery order that has come down, some other ruling. Once we get to trial and something else happens or whatever, at every phase of the litigation, always figure out where you are at that point. How has

that affected my clients, and always continue to always be talking about how you might get this matter resolved.

There will be other issues that come up. If this case requires a lot of work, you know, one thing that the Court will be considering, we have -- you know, there's one magistrate judge assigned to this case who has another 400 cases or so that she's dealing with. Some of whom are just as large as these here. And I'm going to put it out there right now, if there is a management issue, the parties need to already be thinking that this judge might appoint a special master to deal with these things instead of burdening the magistrate judge with all the discovery disputes that will come along if we're talking about 2,000 plaintiffs, if we're talking about 1,500 plaintiffs. You know, what -- what written discovery might be allowed first, how might that impact what depositions might be taken next, what order we might want to get them in and all that, who's going to be ruling on them.

So I do want you to already be thinking about the possibility of a special master. The Court may give the parties an opportunity to make recommendations, but obviously the parties know that it is fully within the discretion of this Court who -- if it goes down that path, it will be with this Court to determine who or what entity or whatever that that might be.

So I'm saying all that while we're at the very beginning of this case, and I know we're probably a long way from it being resolved. But y'all are going to work with me to make sure we put it in the position of always being in the position to be resolved.

So, again, thank you so much. The Court is taking these things under advisement, and I'll rule in due course.

And let me say this other thing. I know the parties had agreed about 30 days or so ago when I announced this particular day, I know it conflicted with some of the things that you had to do. I did want to poll the lawyers because this court, I put this day -- I set this hearing on this day, because this is the only day I had. So to the extent -- you know, we have multiple parties on every side, all different counsel, get everybody involved with your clients, with these issues, because of course, we deal with many other cases, many other things, and this was the one day -- and I know these motions have been pending for sometime. This was the one day that I had practically for this month to have this heard, so that's why the motion to reset it and all was denied. And I didn't hear a request to reconsider or an alternative or anything else, so you might -- it's not that I'm trying to be rude. It's just that I'm trying to make sure we can plug things in on the times that I can be in court.

There may be instances in the future that we would do some of these remotely, because I do spend a significant amount of time on what they call "a second job" now. So I'm out in Washington quite a bit on that second job, so if parties would agree to do things remotely, but I wanted you to be present for this one here. We may be able to accommodate that in the future.

So to the extent it caused heartburn to anyone, I'm just telling you that's why it was done, and that's probably how we will be proceeding from this day forward because we have too many different -- we have too many lawyers involved -- not too many -- too many to coordinate schedules, because I know each of you are representing other clients in other courts and all of that. If it does not match your schedule, turn to your law partner, turn to your associates, turn to somebody, and say you're going to have to do this for me on this day here. The Court needs you there, the Court has set a hearing, and the Court is only doing that so we can make things go forward. So I wanted to tell you that.

Thank you so much. The Court is in recess until our next matter.

MS. SUMMERS: All rise.

****

CERTIFICATE OF COURT REPORTER

I, Candice S. Crane, Official Court Reporter for the United States District Court for the Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true, and correct transcript of the proceedings had in the forenamed case at the time and place indicated, which proceedings were stenographically recorded by me to the best of my skill and ability.

I further certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

THIS, the 8th day of September, 2023.

/s/ Candice S. Crane, RPR RCR CCR

Candice S. Crane, RPR, RCR, CCR #1781
Official Court Reporter
United States District Court
Candice_Crane@mssd.uscourts.gov